CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 595

KERSH LAKE DRAINAGE DISTRICT, ETC., ET AL.,
PETITIONERS,

vs.

A. J. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR CERTIORARI FILED DECEMBER 16, 1939.

CERTIORARI GRANTED JANUARY 29, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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KERSH LAKE DRAINAGE DISTRICT, PETITIONER,

vs.

A. J. JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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[fol. a] [Caption omitted]

[fol. 1] **IN LINCOLN CHANCERY COURT**

BOARD OF COMMISSIONERS OF THE KERSH LAKE DRAINAGE DISTRICT,

Plaintiff,

vs.

DELINQUENT LANDS,

Defendants

COMPLAINT—Filed March 12, 1938

Come C. H. Holthoff, Emmett Warren, and T. H. Free, duly appointed, qualified, and acting commissioners of the Kersh Lake Drainage District, and in pursuance to a resolution regularly passed at a meeting of said Board of Commissioners authorizing the institution of this action, and for cause, state:

That the Kersh Lake Drainage District is a corporation organized and existing under and by virtue of a general act, (and acts amendatory thereof), of the General Assembly of the State of Arkansas, approved by the Governor May 29, 1909, for the purpose of creating and maintaining drains in the State of Arkansas, to incorporate a Board of Commissioners for said District and for other purposes in said act mentioned; said act is set forth in the published acts of the General Assembly of the State of Arkansas for the year as set forth from page 829 to 853, both inclusive, of said public acts, references to which is here made, and a copy of which is herewith filed as Exhibit "A" to this complaint.

Said Board of Commissioners of the Kersh Lake Drainage District as created and formed under and by virtue of said general act of the General Assembly, includes among other lands, each and all of the several tracts of land hereinafter mentioned and set forth as delinquent for the drainage taxes due thereon to plaintiff for the respective years and as hereinafter more particularly mentioned.

Each and all of the requirements as to the organization of said drainage district, the appointment and qualification of the assessors, therefor, their organization and acts, both as assessors and board of equalization, as provided in said [fol. 2] acts of the General Assembly creating and govern-

ing said District; the levy and collection of taxes as provided in said acts, including all legal notices and other requirements in said acts provided, including the appointment, qualification and acts of any and all officers whatsoever, authorized and provided for by said acts of the General Assembly, were in all things duly and faithfully complied with by plaintiff.

That the drains and ditches contemplated by said Act have been duly constructed in the manner contemplated thereunder, consisting of one main ditch and ten lateral ditches, at a cost to said District of about the sum of $181,500.00, exclusive of interest, for which certificates of indebtedness of said District have been duly issued, and approximately $63,000.00 thereof remains outstanding.

That an assessment of the increased value of betterments to accrue to the lands hereinafter described by reason of the construction of said drains, in the manner provided in said acts, was duly had, that the supposed name or names of the owners, thereof, the number of acres and the amount of drainage tax due for the year for which said lands are delinquent are hereinafter set forth, to which should be added also a penalty of twenty-five per cent (25%) of the taxes for each year for which said lands are delinquent, with interest thereon at the rate of six per cent (6%) per annum as provided by said acts, which is also due against same.

That for the said years hereinafter mentioned there was duly levied by the plaintiff, a drainage tax of six and five-tenths per cent (6.5%) on said betterments for the years 1935 and 1936.

That the owners of the lands as hereinafter described and for said years as hereinafter mentioned have failed and refused to pay said drainage taxes, and said lands have been duly returned delinquent as provided in said acts by reason of the nonpayment of taxes for said year; and there is now justly due by said lands the drainage taxes, together with penalty of twenty-five per cent (25%) thereon for [fol. 3] each year, together with six per cent (6%) interest as provided in said acts and all cost of the proceeding; all of said lands being in the County of Lincoln and State of Arkansas, the numbers given opposite each call referring to the section, township and range as follows, to wit:

(Description shown in full—Transcript pages 91 to 113, incl.)

That the plaintiff has a lien in the nature of a mortgage under and by virtue of the terms of said Acts upon each and all of the several tracts aforesaid, for the amount of said taxes, penalty and interest now due thereon as aforesaid.

Wherefore, plaintiff prays that said taxes, with penalty and interest as aforesaid be declared a lien upon the aforementioned respective tracts of lands for the amount or amounts severally due by each by virtue of their delinquencies aforesaid; that the plaintiff have judgment against said lands therefore, as provided by said Acts; that a short time be fixed by the court in which such judgments shall be paid; that in the event that same is not paid on or before the day to be so fixed, that said lands be sold by order of this court; that a commissioner of this court be appointed to conduct such sale, that such sale be had in the mode and manner prescribed by said Acts; and for general relief.

E. W. Brockerman, Attorney for Plaintiff.

Duly sworn to by E. W. Brockerman jurat omitted in printing.

[File endorsement omitted.]

[fol. 4] IN LINCOLN CHANCERY COURT

[Title omitted]

SEPARATE ANSWER OF A. J. JOHNSON AND ALL OTHER LANDOWNERS SIMILARLY SITUATED—Filed April 14, 1938

For his answer to the complaint filed herein, the defendant states that he is the owner, and has been at all times covered by this complaint, the following lands in Lincoln County, Arkansas, to-wit:

The Southwest Quarter (S. W. ¼) of Section Eight (8), Township Nine (9) South, Range Five (5) West,

together with other lands in said district similarly situated and similarly charged as the above lands. The defendant denies each and every material allegation in the complaint.

Denies that said lands are delinquent, denies that there is due on said lands $136.34 or any other sum.

Answering further defendant admits that the plaintiff district was organized by the Circuit Court of Jefferson County, Arkansas, on August 12, 1912 under Act 279 of the General Assembly of Arkansas, approved May 27th, 1909 and as amended by the General Assembly in 1911. That under the terms of said statute plaintiff district was required to calculate the interest on its money borrowed for the purpose of making the improvements contemplated and to include said interest in its assessment of benefits. That pursuant to said statute plaintiff district made prior to the assessment of benefits its cost of construction for the work contemplated by the district as follows:

Bond Issue	$135,000.00
10% for Contingencies	24,798.38
Interest on Bonds for 20 years	112,983.74
Total Cost of Construction	$272,782.12

[fol. 5] On the basis of the foregoing cost of construction this defendant's lands above described were assessed at the total sum of Sixteen Hundred Dollars ($1600.00) together with the other assessments made at this time aggregating for the district a total assessed benefits of $293,191.90. This assessment became final and incontestible as indicated in the order hereinafter set out. That the defendant with other land owners was assured that the benefits thus assessed did not draw interest and would not otherwise be increased. That the plan of the district as originally planned were not altered or changed and no additional benefits whatever were ever attempted, offered or made to the said lands; lands have been bought and sold with the warranty as provided by law at the organization that the benefits could not be increased.

That on March 4th, 1913 the Jefferson Circuit Court upon the foregoing estimate as submitted by the plaintiff district entered an order, among other things, as follows, to-wit:

"Now, therefore it is hereby considered, ordered and adjudged by the Circuit Court of Jefferson County, Arkansas, that there shall be assessed upon the real property, the railroads, tramroads, corporate and public roads of Kersh Lake Drainage District a tax of $272,782.12, which is the estimated cost of the improvement in said drainage district, being the bond issue, $135,000.00 with the accrued

interest thereon with ten per centum (10%) added for unforeseen contingencies, which tax is to be paid by the real property, railroad, tramroads, corporate and public roads in said district in the proportion to the amount of the assessment of benefits thereon, and which tax shall be a lien upon all the real property, railroads, tram roads, corporate and public roads in said district from this date and shall be entitled to preference over all demands, executions, encumbrances or liens whatsoever created, and shall continue until such assessments with any penalty and costs that may accrue thereon shall have been paid."

There was a large amount of the land within the limits of the plaintiff district on its organization that were not [fol. 6] assessed any benefits whatsoever. That the Board of Commissioners of the plaintiff district in any manner provided by law did in the year 1924 make a new or an additional assessment of benefits in behalf of this plaintiff district on lands not previously assessed and increased the value of the benefit assessment of said district in the total sum of $53,08[illegible]. That the assessment on this defendant's land was not changed or was not re-assessed. The defendant from the years 1913 to 1932 paid to the district a total sum of $1628.00, being the entire assessment, said payments being made in installments as follows:

January 1914, 1915, 1916, and 1917 @ $48.00 each	$192.00
January 1918, 1919 and 1920 @ $76.00 each	228.00
January 1921 and 1922 @ $130.00 each	260.00
January 1923 and 1924 @ $162.00 each	324.00
January 1925 to 1930 inclusive @ $104.00 each	624.00
Total Payments	$1628.00

That in 1931 after the above payments had been made defendant district levied an additional tax of $104.00 upon the foregoing lands of this defendant and the defendant did on May 15th 1931 contest with the plaintiff district the validity and legality of said additional assessment and the Chancery Court of Lincoln County held in its decree rendered on the 19th day of October, 1931 that the foregoing lands were not liable in favor of the plaintiff district. That a copy of the decree is attached to this complaint and made a part hereof.

The defendant states further that upon the rendition of said decree on October 1931 that W. A. Fish and others

filed a petition in said Lincoln Chancery Court regarding the additional assessment on all other lands in the district on which there had been paid the total amount of the original assessment of benefits. This cause was likewise heard and on the 15th day of June, 1932 the Chancery Court rendered its decree releasing and satisfying and freeing all of said lands from any further liens or liabilities in favor of the plaintiff district, and copy of said decree is hereto attached and made a part of this complaint.

[fol. 7] The defendant further states that the assessment and extension of taxes against his land is void and illegal, being contrary to laws of Arkansas and constitutes a cloud on the title of the defendant's land.

Wherefore, the defendant prays that the prayer of the complaint be denied, and that the complaint as to the land herein involved be dismissed and for such other relief as in this court defendant is entitled.

T. S. Lovett, Jr., A. J. Johnson, Attorney- for Defendant.

[File endorsement omitted.]

[fol. 8] EXHIBIT "A" TO ANSWER

IN THE LINCOLN CHANCERY COURT

#1556

A. J. JOHNSON, Plaintiff,

vs.

KERSH LAKE DRAINAGE DISTRICT, et al., Defendants

DECREE

On this 19th day of Oct., 1931, comes this cause for final determination and judgment and comes the plaintiff in person and comes the defendant by its attorney and the cause is by agreement of the parties submitted in vacation for trial upon the complaint, the answer and the agreed statement of facts and the court being advised as to the law and facts in the premises finds that the plaintiff is the owner in fee of the S. W. ¼ of Section 8, Township 9 South, Range 5 West; that said lands constitute a part of the

Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties; that said drainage district was organized by judgment of the Jefferson Circuit Court on August 24, 1912 under Act 279 of the Acts of 1909, and said lands as assessed a benefit of $1600.00 by the Assessors of said Kersh Lake Drainage District, and said assessment of benefits was duly confirmed by judgment of the Circuit Court of Jefferson County, Arkansas, on Feb'y 3rd, 1913; that subsequent to the confirmation of the assessment of benefits taxes were annually extended against plaintiff's said land and from Jan'y 1st, 1914 to and including the year 1929 payable in 1930 the plaintiff paid a tax in favor of Kersh Lake Drainage District and as a credit on the assessment of benefits made and confirmed against his lands the total sum of $1628.00; that the defendant commissioners over the protest of the plaintiff extended a total and further tax of $104.00 for the year 1930 payable in 1931 in favor of Kersh Lake Drainage District and the plaintiff has refused [fol. 9] to pay and the foregoing described lands have been certified by the Collector of Lincoln County to the Chancery Clerk of Lincoln County as delinquent for said amount and said commissioners are about to sell said lands for said delinquency.

The court further finds that upon the payment by the plaintiff of the total assessed benefits in favor of Kersh Lake Drainage District in the sum of $1600.00 against the S. W. ¼ of Section 8, Township 9 South, Range 5 West, all the lien, right or interest of the Kersh Lake Drainage District against said lands by virtue of the improvements made by the board of commissioners of and for the Kersh Lake Drainage District become duly paid and satisfied and the commissioners were without authority to extend further taxes against plaintiff's land collectible in year 1931 or any other years.

It is therefore considered, ordered and decreed that the lien of Kersh Lake Drainage District against S. W. ¼ of Section 8, Township 9 South, Range 5 West by virtue of its assessment of benefits in the sum of $1600.00 is fully satisfied and released; that the tax extended by the Commissioners for 1930 collectible in 1931 is without authority and void and the Clerk of this court shall satisfy the record of delinquent lands returned to him in 1931 as far as S. W. ¼ Section 8, Township 9 South, Range 5 West is concerned, and the defendant Commissioners are perma-

nently restrained from extending other or further taxes against the plaintiff's said lands and the plaintiff shall have judgment for his costs herein expended.

Harvey R. Lucas, Chancellor.

[fol. 9½] Clerk's certificate to foregoing paper omitted in printing.

[fol. 10] EXHIBIT "B" TO ANSWER

IN THE LINCOLN CHANCERY COURT

W. A. FISH, CLYDE E. FISH, et al., Plaintiffs,

vs.

C. H. HOLTHOFF, EMMETT WARREN, T. H. FREE, Commissioners Kersh Lake Drainage District, Defendants

DECREE

On this 15th day of June, 1932, this cause comes on for hearing before the Chancellor in Chambers, having been submitted by the parties on June 13th, 1932, during the regular adjourned session of the Court, and comes the plaintiffs by their attorney A. J. Johnson, and comes the defendants by their attorney E. W. Brockman and consents that the cause be heard for final decree on the complaint and exhibits thereto, the answer, the audit of the defendant district prepared in 1931; the supplemental audit of — prepared in 1932, the testimony of C. H. Holthoff and J. S. Fish and statement of counsel and on consideration of all the testimony and being fully advised finds the facts and declares the law in the premises as follows, to-wit:

First. That Kersh Lake Drainage District taxes paid in 1931 have been disbursed by the board of Commissioners in payment of the district's indebtedness and the plaintiffs' prayer for refund of said 1931 taxes is denied.

Second. That the assessed benefits on the lands in defendant district as confirmed by the court in favor of said district constitutes the total liability of said lands or the owners thereof to the defendant district; that the record of said benefits being on file with the County Clerk of Lincoln County, Arkansas.

Third. That extension of taxes by defendant district payable in 1932, where said extension plus taxes paid prior to [fol. 11] 1932 were in excess of the benefits confirmed against each and every parcel of land is an illegal and void tax to the full extent of such excess.

Fourth. That all taxes in favor of the defendant district payable in 1932 in excess of benefits are illegal and where paid under protest or on agreement that the same be refunded when correct amount be determined shall be by the Board of Commissioners refunded to the tax payer paying the same, and all extensions of taxes against the lands of the district payable in 1932 in excess of the benefits are illegal and void and the collector shall be credited with the excess where same was not paid the balance due, if any, if not paid by said land owners shall be returned delinquent.

Fifth. The Court finds as a complete and correct statement of total benefits against the lands, total payments made, balance due, excess payments, excess extensions and excess payments in 1932, as to the lands hereafter described are as follows, to-wit:

Descriptions omitted. See exhibit attached.

It is therefore considered, ordered and decreed that the commissioners of defendant Kersh Lake Drainage District be and they are directed to refund to the owner of the respective lands above described the amounts set opposite said lands in the columns marked "To be refunded tax payer"; that it is ordered and decreed that the defendant Commissioners shall credit the collector and the respective tracts of land with the respective amounts set out in the column marker "To be credited collector", and the defendant commissioners and the defendant Kersh Lake Drainage District are restrained from assessing, levying, or in any way encumbering any lands described above with taxes for said defendant district except such lands as are shown to be a balance due and listed in column marked "Balance to be levied", all refunds to be made at once and the collector [fol. 12] credited and the report thereof filed with the Clerk of this court as a permanent file thereof to be kept in the files of this cause.

Harvey R. Lucas, Chancellor.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 12a]

Section 26, Township 8S Range 6 West

Name	Part of Sec. or lot	Acres	Benefit	Bal. due
Mo. State Life Ins. Co.	NE¼ SE¼	40	$200	

Section 35, Township 8S, Range 6 West

Kansas City Title & T. Co.	NE¼	160	800	
T. H. Free	E½ SE¼	80	600	
Mo. State Life Ins. Co.	Pt. NW¼ SE¼	35	175	
T. H. Free	Pt. NW¼ SE¼	5	25	
T. H. Free	SW¼ SE¼	40	200	

Section 36, Township 8S Range 6 West

A. G. Ramkin Est.	NE¼	160	1600	
Robert Jackson	N pt. NE¼ NW¼	13.50	67.50	
T. H. Free	S pt. NE¼ NW¼	26.50	132.50	
Same	W½ NW¼	80.00	400.00	
Same	SE¼ NW¼	40.00	200.00	
Same	SW¼	160	1300.00	
A. G. Ranking Est.	SE¼	160	1600.00	

Section 1, Township 9S Range 5 West

C. H. Holthoff	Lots 1, 2, 3, 4, N½	215.98	3098.00	
Gantt & Warren	" 5, 6, 7, 8, N½	164.80	2055.52	
C. H. Holthoff	" 9, 10 N½	78.67	984.10	
F. H. Holthoff	Lot 11 N½	39.60	496.00	
C. H. Holthoff	" 12 N½	39.62	498.20	
Gantt & Warren	" 13, 14, 15, 16, N½	164.52	1834.88	
C. H. Holthoff	" 17, N½	39.80	411.20	
F. H. Holthoff	" 18, N½	39.88	391.80	
C. H. Holthoff	" 19, N½	40.16	562.24	
J. E. Allmon	" 20, N½	40.16	562.24	
Gantt & Warren	" 21, 22, 23, 24, N½	162.52	2038.44	
J. E. Allmon	" 25, N½	40.20	401.60	
C. H. Holthoff	" 26, N½	40.33	401.40	
State	NE¼ SW¼	40	600.00	
State	W½ SW¼	80	1200.00	
Mo. State Life Ins. Co.	SE¼ SW¼	40	600.00	
Gannt & Warren	N½ SE¼	80	1000.00	$425.30
Mo. State Life Ins. Co.	S½ SE¼	80	1000.00	313.50

Section 2, Township 9S Range 5 West

C. H. Holthoff	E½, Lot 1 N½	26.36	263.60	
Bluthenthal Sup. Co.	W½ " 1 N½	26.36	263.60	
Same	N. pt. Lot 2 N½	45.31	453.10	155.80
C. H. Holthoff	S. pt. " 2 N½	20	200.00	
Same	S. pt. " 3 N½	20	200.00	
Bluthenthal Sup. Co.	N. pt. " 3 N½	42.02	466.20	
C. H. Holthoff	Lot 4 N½	41	410.00	
W. S. Turner	" 5 N½	41	410.00	
Catherine Livingston	" 6, 7 N½	81	820.00	
C. H. Holthoff	" 8, 9, 10, 11, N½	170.32	1279.13	
Charley Parks	" 12, N½	40	500.00	
State	" 13, N½	42	525.00	
C. H. Holthoff	" 14, N½	41	500.00	
State	Pt. Lot 15 N½	6	75.00	
State	" " 15 N½	35	437.50	
Mary Ingram	Lots 16, 17 N½	84.86	921.67	117.35
Same	N½ Lot 18 N½	21.17	119.25	
F. H. Holthoff	S½ Lot 18 N½	21.16	119.25	
Mary Ingram	N½ Lot 19 N½	21.16	251.25	
F. H. Holthoff	Pt. S½ Lot 19 N½	19.17	251.25	
State	N½ Lot 20 N½	20.50	153.75	

Section 2, Township 9S Range 5 West—Continued

Name	Part of Sec. or lot	Acres	Benefit	Bal. due
State	S½ Lot 20 N½	20.50	$153.75	
State	Lot 21 N½	41	307.50	
J. H. Cochran	Pt. Lot 22 N½	31	405.71	
State	" " 22 N½	10	125.62	
State	" " 23 N½	41	512.50	
O. L. Flynn	Lot 24 N½	42.23	422.30	
Same	Lot 25 N½	42.23	422.30	
[fol. 12b]				
Mrs. J. M. Matthews	SW¼	160	800.00	
State	NE¼ SE¼	40	500.00	
State	NW¼ SE¼	40	500.00	
State	SW¼ SE¼	40	500.00	
State	SE¼ SE¼	40	500.00	

Section 3, Township 9S Range 5 West

A. A. Spurlock	Lots 1, 2 N½	104.41	783.08	$122.11
Same	E pt. Lot 3 N½	12.02	90.15	
Cal Spurlock	W pt. Lot 3 N½	36.03	270.23	
Same	Lot 4 N½	44.15	359.70	
C. H. Holthoff	Lot 5 N½	40.66	304.95	
Cal Spurlock	Lot 6 N½	40.07	359.70	
C. H. Holthoff	Lots 7, 8, 9, 10, 11, 12 N½	242.59	809.25	
B. F. Boren	Lots 13, 14 N½	81.17	609.46	
R. L. Boren	Lot 15 N½	40.34	327.38	
R. L. Boren	Pt. Lot 16 N½	39.84	107.87	
B. F. Boren	" " 16 N½	.50	1.25	
F. H. Holthoff	Pt. Lot 17 N½	40.34	100.85	
B. F. Boren	Lots 18, 19 N½	80.86	403.00	
O. L. Flynn	Lots 20 N½	40.51	505.44	
John Rhodes	Lot 21 N½	40.46	609.52	
B. F. Boren	Lots 22, 23 N½	80.77	1014.23	
Hattie Ousley	Lot 24 N½	40.34	113.35	
John R. Rhodes	NE¼ SW¼	40	600.00	
Mrs. J. M. Matthews	NW¼ SW¼	40	600.00	
W. J. Rolinson	S½ SW¼	80	1200.00	
Mrs. J. M. Matthews	SE¼	160	800.00	

Section 4, Township 9S Range 5 West

C. H. Holthoff	W½ Lot 1 N½	38.45	384.70	
B. F. Boren	E½ " 1 N½	38.45	384.70	
State	W½ " 2 N½	32.81	328.00	
State	E½ " 2 N½	32.81	328.00	
State	Lot 3 N½	41.58	404.60	
State	Lot 4 N½	41.58	404.60	
C. H. Holthoff	Lot 5 N½	40.24	402.40	
Same	Lot 6 N½	40.24	402.40	
L. L. Hoover	Lot 7 N½	40.24	502.98	
State	Lots 8, 9 N½	81.62	1014.50	
Cal Spurlock	Lot 10 N½	41.35	516.98	
State	Lot 11 N½	41.16	516.98	
State	E½ Lot 12 N½	20.59	257.36	
State	W½ Lot 12 N½	20.59	257.36	
State	E½ Lot 13 N½	20.12	251.20	
State	W½ Lot 13 N½	20.12	251.50	
State	W½ Lot 14 N½	20.12	251.25	
State	S½ Lot 14 N½	20.12	251.25	
State	Lot 15 N½	40.24	503.02	
State	Lot 16 N½	40.24	503.02	
State	Lot 17 N½	40.87	510.91	
State	Lot 18 N½	40.96	512.03	
State	Lot 20 N½	40.76	509.52	

Section 4, Township 9S Range 5 West—Continued

Name	Part of Sec. or lot	Acres	Benefit	Bal. due
State	Lot 20 N½	40.76	$509.48	
State	Lot 21 N½	40.24	503.00	
Will Jasper	Lot 22 N½	40.24	503.00	
State	NE¼ SW¼	40	500.00	
State	NW¼ SW¼	40	500.00	
State	SW¼ SW¼	40	500.00	
State	SE¼ SW¼	40	500.00	
State	NE¼ SE¼	40	500.00	
State	NW¼ SE¼	40	500.00	
State	SW¼ SE¼	40	500.00	
State	SE¼ SE¼	40	500.00	
	Section 5, Township 9S Range 5 West			
A. G. Rankin Est.	Lots 1, 2, 3, 4, 5, 6 N½	332.43	4109.60	
[fol. 12c]	Section 5, Township 9S Range 5 West			
State	Lot 7 N½	40.14	602.10	
State	Lot 8 N½	40.14	602.10	
State	Nry Lot 9 N½	3	45.00	
State	Lot 10 N½	40.14	608.40	
State	Lot 11 N½	40.63	608.40	
State	Lot 12 N½	40.61	607.65	
State	Lot 13 N½	40.31	602.70	
State	Lot 14 N½	40.32	602.70	
State	Lot 15 N½	40.14	602.70	
State	Nry Lot 16 N½	5.14	77.10	
State	Sry Lot 16 N½	35	525.00	
State	Lot 17 N½	40.14		
State	Lot 18 N½	40.14	602.10	
State	Lot 19 N½	40.14	602.10	
State	Lot 20 N½	40.40	602.10	
Frank Horsefall	E½ SW¼	80	1200.00	
State	NW¼ SW¼	40	600.00	
Sherman Williams	SW¼ SW¼	40	600.00	
State	N of Canal NE¼ SE¼	6	90.00	
State	S of Canal NE¼ SE¼	34	510.00	
State	NW¼ SE¼	40	600.00	
State	SW¼ SE¼	40	600.00	
State	SE¼ SE¼	40	600.00	
	Section 6, Township 9S Range 5 West			
A. G. Rankin Est	All Frl. Sec.	1697.21	5091.63	
	Section 7, Township 9S Range 5 West			
A. G. Rankin Est	NE¼	160.00	1800.00	
Same	Lots 1, 2, 3, 4, 5, 6, 7 NW¼	292.04	732.55	134.03
Same	Lots 8, 9, 10 SW¼	120.00	241.05	
J. B. Avery	Lots 11, 12 SW¼	84.91	160.00	
A. G. Rankin Est.	Lots 13, 14 SW¼	80	160.00	
Same	SE¼	160	560.00	
	Section 8, Township 9S Range 5 West			
Frank Horsefall	P. N½ NE¼	80	1200.00	
F. L. Duckworth	P. S½ NE¼	80	1200.00	
Frank Horsefall	P. NE¼ NW¼	40	600.00	
Henry Swift	D. NW¼ NW¼	40	600.00	
Pete Johnson	P. SW¼ NW¼	40	600.00	
A. J. Johnson	P. SE¼ NW¼	40	600.00	
Same	P. SW¼	160	1600.00	
W. A. Fish	D. SE¼	160	1600.00	

Section 9, Township 9S Range 5 West

Name	Part of Sec. or lot	Acres	Benefit	Bal. due
W. J. Rolinson	P. NE¼ NE¼	40	$500.00	
State	D. NW¼ NE¼	40	500.00	
Mrs. K. M. F. Conney	D. S½ NE¼	80	1000.00	
State	D. NE¼ NW¼	40	500.00	
M. & F. Bank	P. NW¼ NW¼	40	600.00	
State	P. SW¼ NW¼	40	600.00	
Mrs. K. M. F. Conney	D. SE¼ NW¼	40	600.00	
Same	D. NE¼ SW¼	40	600.00	
O. L. Flynn	P. NW¼ SW¼	40	600.00	
State	D. SW¼ SW¼	40	500.00	
State	D. SE¼ SW¼	40	500.00	
J. G. Ringo Est.	P. SE¼	160	1600.00	

Section 11, Township 9S Range 5 West

State	D. NE¼	160	2249.00	
State	P. N½ NW¼	80	200.00	
[fol. 12d]				
Metro. Life Ins. Co.	D. SW¼ NW¼	40	300.00	
State	P. SE¼ NW¼	40	480.00	
Metro. Life Ins. Co.	D. E½ SW¼	80	800.00	
Florence Witherspoon	D. NW¼ SW¼	40	240.00	
J. G. Ringo Est.	P. SW¼ SW¼	40	60.00	
State	D. N½ SE¼	80	1000.00	
Metro. Life Ins. Co.	D. S½ SE¼	80	1000.00	

Section 12, Township 9S Range 5 West

Mo. State Life Ins. Co.	D. E½ NE¼	80	800.00	
State	D. NW¼ NE¼	40	400.00	
State	D. SW¼ NE¼	40	400.00	
Mo. State Life Ins. Co.	D. NE¼ NW¼	40	600.00	
S. A. Banks	D. NW¼ NW¼	40	600.00	
Mo. State Life Ins. Co.	D. SW¼ NW¼	40	600.00	
S. E. Weston	D. SE¼ NW¼	40	600.00	
State	D. SW¼	160		
Geo. Nicholson	P. SE¼	160	2000.00	

Section 20, Township 8S Range 5 West

T. H. Free	D. NE¼ NE¼	40	500.00	
Dr. A. Thiolliere	P. W½ NE¼	80	1000.00	$233.30
Same	P. SE¼ NE¼	40	500.00	
State	D. NE¼ NW¼	40	500.00	
T. H. Free	D. W½ NW¼	80	600.00	115.80
Same	D. SE¼ NW¼	40	500.00	
Henry Wilkes	D. NE¼ SW¼	40	300.00	
T. H. Free	D. W½ SW¼	80	200.00	
Same	D. SE¼ SW¼	40	100.00	
Dr. A. Thiolliere	P. SE¼	160	2000.00	189.92

Section 21, Township 8S Range 5 West

W. C. Shepherd	P. Ery. E½ NE¼	34.54	517.50	
G. H. Holthoff	D. wry E½ NE¼	45.17	682.40	
State	D. W½ NE¼	80	800.00	
State	D. Pt. SE¼ NE¼	.33	4.95	
James Parish	P. Pt SE¼ NE¼	.03	.45	
State	P. NE¼ NW¼	40	600.00	
F. A. West, Gdn.	P. NW¼ NW¼	40	600.00	
Same	P. SW¼ NW¼	40	600.00	
State	P. SE¼ NW¼	40	600.00	
Mary Hill	P. E½ SW¼	80	1200.00	
Dr. A. Thiolliere	P. W½ SW¼	80	1200.00	
J. O. Knight	P. N½ SE¼	80	1200.00	
Wm. Zachirsa	P. S½ SE¼	80	1200.00	

Section 22, Township 8S Range 5 West

Name	Part of Sec. or lot	Acres	Benefit	Bal. due
W. C. Shepherd	P. N½	320	$2900.00	
State	D. Pt. NE¼ SW¼	39		
Belle Ellis	P. Pt. NE¼ SW¼	1		
State	D. Ery N½ N½, NW¼ SW¼	7	87.50	
J. O. Knight	P. Wry N½ N½ NW¼ SW¼	2.25	37.50	
State	P. Ery S½ N½ NW¼ SW¼	6	75.00	
J. O. Knight	P. Wry S½ N½ NW¼ SW¼	4	50.00	
A. L. Nuchols	D. Ery S½ NW¼ SW¼	3	37.50	
T. W. Gill	D. Wry S½ NW¼ SW¼	17.75	212.50	
Same	D. Wry S½ SW¼	50.51	631.37	164.85
T. W. Gill	D. Ery S½ SW¼	20.49	368.63	
E. H. Voight	P. NE¼ SE¼	40	500.00	
C. H. Holthoff	D. NW¼ SE¼	40	500.00	
T. W. Gill	D. SW¼ SE¼	40	300.00	
C. H. Holthoff	D. SE¼ SE¼	40	500.00	
Sophie Mitchell	P. NE¼ NE¼	40	500.00	
W. T. Tucker	P. NW¼ NE¼	40	500.00	

[fol. 12e]

Section 26, Township 8S Range 5 West

Tom Lincoln	P. N½ SW¼ NE¼	20	250.00	
C. W. Vick	P. SW¼ SW¼ NE¼	10	125.00	
W. E. Massey	D. SE¼ SW¼ NE¼	10	125.00	
Tom Lincoln	P. N½ SE¼ NE¼	20	250.00	
Charles Head, Est.	P. S½ SE¼ NE¼	20	250.00	
W. E. Massey	D. NE¼ NW¼	40	500.00	
W. T. Tucker	P. NW¼ NW¼	40	500.00	230.00
W. E. Massey	D. SW¼ NW¼	40	500.00	
C. W. Vick	P. E½ SE¼ NW¼	20	250.00	
W. E. Massey	D. W½ SE¼ NW¼	20	250.00	110.26
Same	D. N½ SW¼	80	1000.00	
Same	D. Pt. SW¼ SW¼	37.61	480.13	
Same	D. SE¼ SE¼	40	500.00	
Charley Head Est.	P. N½ NE¼ SE¼	20	250.00	
W. E. Massey	D. S½ NE¼ SE¼	20	250.00	
Same	D. W½ SE¼	80	1000.00	
State	D. Pt. N½ SE¼ SE¼	.25	3.13	
Annie Harris	P. Pt. N½ SE¼ SE¼	2.47	30.87	
State	D. Pt. N½ SE¼ SE¼	2	25.00	
W. E. Massey	D. Pt. N½ SE¼ SE¼	15.28	191.00	
Same	D. S½ SE¼ SE¼	20	250.00	
Same	D. SE¼ SW¼	40	500.00	

Section 27, Township 8S Range 5 West

C. H. Holthoff	D. NE¼ NE¼	40	500.00	
State	D. NW¼ NE¼	40	400.00	
W. E. Massey	D. Ery S½ NE¼	60	750.00	130.09
C. H. Holthoff	D. Wry S½ NE¼	20	150.00	
State	D. Pt. NE¼ NW¼	33	412.50	
Dr. A. Thiollier	P. Pt. NE¼ NW¼	7	87.50	
State	D. NW¼ NW¼	40	400.00	
W. E. Massey	D. SW¼ NW¼	40	500.00	
Same	D. NE¼ SE¼ NW¼	10	125.00	
Abston Buckner	P. W½ SE¼ NW¼	20	250.00	
C. H. Holthoff	D. SE¼ SE¼ NW¼	10	125.00	
Union Cen. Life Ins. Co.	P. SW¼	160	2000.00	
W. E. Massey	D. N & Ery NE¼ SE¼	20	250.00	
Union Cen. Life Ins. Co.	P. Pt S & Wry NE¼ SE¼	16.89	211.12	
Same	P. NW¼ SE¼	40	500.00	
J. S. Waterman	P. SW¼ SE¼	40	500.00	
W. E. Massey	D. Pt. SE¼ SE¼	35.31	441.38	

Section 28, Township 8S Range 5 West

Name	Part of Sec. or lot	Acres	Benefit	Bal. du
John & Wm. F. Muntz	P. NE¼	160	$2400.00	
G. H. Voight & H. H. Myers	P. NW¼	100	1600.00	
Josephine Bruce	P. NE¼ SW¼	40	600.00	
C. C. Handley	D. NW¼ SW¼	40	100.00	
Ophilia Miller	D. SW¼ SW¼	40	100.00	
State	D. SE¼ SW¼	40	100.00	
Union Cen. Life Ins. Co.	P. SE¼	160	2200.00	

Section 29, Township 8S Range 5 West

Dr. A. Thiollier	P. NE¼	160	1800.00	395.82
W. E. Free	P. N½ NW¼	80	200.00	
Same	P. SW¼ NW¼	40	100.00	
Mrs. G. L. McMichall	P. SE¼ NW¼	40	300.00	
State	P. N½ SW¼	80	200.00	
Elizabeth O. Crawford	P. S½ SW¼	80	200.00	
J. W. Moorehead	P. N½ SE¼	80	600.00	
Jeff Daniels	P. Pt. SW¼ SE¼	38	95.00	
School	P. Pt. SW¼ SE¼	2		
Jeff Daniels	P. 3/8 int. SE¼ SE¼	15	112.50	
C. H. Holthoff	P. 5/8 int. SE¼ SE¼	25	187.50	

[fol. 12f]

Section 30, Township 8S Range 5 West

Mrs. Kroley	D. NE¼	160	400.00	
Fannie Jones	P. Frl. NE¼ NW¼	40.08	300.00	
Gould Galbraith Sup. Co.	D. Frl. NW¼ NW¼	39.41	300.00	
State	D. Frl. SW¼ NW¼	39.47	300.00	
State	D. Frl. SE¼ NW¼	40.07	300.00	
A. G. Rankin Est.	D. Frl. SW¼	159	400.00	
State	P. N½ SE¼	80	200.00	
State	D. SW¼ SE¼	40	300.00	
Minnie Quinn	P. N½ SE¼ SE¼	20	150.00	

Section 31, Township 8S Range 5 West

A. G. Rankin, Est.	D. Frl. N½	218.92	2400.00	
Same	D. Frl. SW¼	159.77	1760.00	
S. B. Taylor	D. SE¼	160.00	1600.00	

Section 32, Township 8S Range 5 West

A. J. Johnson	P. N½ NE¼	80	160.00	
Gould Galbraith Sup. Co.	P. SW¼ NE¼	40	300.00	
State	P. SE¼ NE¼	40	300.00	
E. O. Crawford	P. N½ NW¼	80	160.00	
Same	P. SW¼ NW¼	40	80.00	
State	D. SE¼ NW¼	40	300.00	
C. H. Holthoff	P. NE¼ SW¼	40	300.00	
E. O. Crawford	P. NW¼ SW¼	40	300.00	
Mrs. C. L. Knox	P. SW¼ SW¼	40	300.00	
C. H. Holthoff	P. SE¼ SW¼	40	300.00	
Same	P. N pt. NE¼ SE¼	6	45.00	
Same	P. S pt. NE¼ SE¼	34	255.00	
Same	P. NW¼ SE¼	40	300.00	
J. F. Knight	P. S½ SE¼	80	600.00	

Section 33, Township 8S Range 5 West

Union Cen. Life Ins. Co.	P. NE¼	160	2200.00	
State	D. NW¼	160	2400.00	
Ophelia Miller	D. NE¼ SW¼	40	200.00	
Rosie Evans	P. Pt. W½ SW¼	16	80.00	
State	P. Pt. W½ SW¼	16	80.00	
State	D. Pt. W½ SW¼	16	80.00	

Section 33, Township 8S Range 5 West—Continued

Name	Part of Sec. or lot	Acres	Benefit	Bal. due
E. B. White	D. Pt. W½ SW¼	16	$80.00	
State	P. Pt. W½ SW¼	16	80.00	
R. W. Giter	P. Pt. SE¼ SW¼	39.50	200.00	
Union Cen. Life Ins. Co.	P. SE¼	160	1800.00	185.30
	Section 34, Township 8S Range 5 West			
W. E. Massey	P. NE¼ NE¼	40	600.00	
Mrs. Inez T. Royston	P. NW¼ NE¼	40	600.00	
Bluthenthal Sup. Co.	D. SW¼ NE¼	40	600.00	
Clyde E. Fish	P. SE¼ NE¼	40	600.00	
Union Cen. Life Ins. Co.	P. N½ NE¼ NW¼	20	300.00	
Bluthenthal Sup. Co.	D. S½ NE¼ NW¼	20	300.00	
Union Central Life Ins. Co.	P. NW¼ NW¼	40	600.00	
Same	P. SW¼ NW¼	40	600.00	
Bluthenthal Sup. Co.	D. SE¼ NW¼	40	600.00	
Same	D. SW¼	160	2200.00	
W. E. Massey	P. N½ SE¼	80	1200.00	
Bluthenthal Sup. Co.	P. S½ SE¼	80	600.00	
	Section 35, Township 8S Range 5 West			
W. E. Massey	D. Pt. N½ SE¼	72.14	360.70	
Bill Joslyn	P. NW¼ SW¼ NE¼	10	50.00	
W. E. Massey	D. Pt. N½ NW¼	61.81	309.05	
[fol. 12g]	**Section 35, Township 8S Range 5 West**			
Gould Coop Gin Co.	P. Pt. NW¼	3.05	15.25	
Valley Ice & Bot. Co.	D. Pt. NW¼	.10		
W. E. Massey	D. Pt. S½ SW¼ NW¼	18	90.00	
Belle Joslyn	P. Ery N½ S½ NW¼	11.66	58.30	
W. E. Massey	D. Pt. N½ S½ NW¼	18.34	90.00	
State	D. Pt. NE¼ SW¼	.20	1.00	
State	D. Pt. NE¼ SW¼	.12	.60	
Ed Jones	P. N. & W. Dg & Sc. Rd. NW¼ SW¼	4	20.00	
A. L. Nuchols	P. Pt. SW¼	6.25	31.25	
Bank of Gould	P. Pt. SW¼	.13	.65	
C. H. Holthoff	P. Pt. SW¼	44.95	234.40	
R. L. Grouger	P. Pt. SW¼	.25	1.25	
L. P. Canady	D. P. SW¼	.13	.65	
T. H. & W. E. Free	P Pt. SW¼	.50	2.50	
Stewart Drug Co.	P Pt. SW¼	.15	.75	
W. M. Zachriach	P Pt. SW¼	.02	10.00	
C. H. Holthoff	P Pt. SW¼	4.25	21.25	
A. L. Nuchols	P Pt. SW¼	6.80	34.35	
American Bldg. & Loan Assn.	P Pt. N. D. G. & Sc Rd. NW¼ SW¼	2	10.00	
E. L. Stewart	P Pt. N. D. G. & Sc. Rd.	1.75	8.75	
American Bldg. & Loan Assn.	P. Pt. N & W. Dg & Sc. Rd. NW¼ SW¼	5.75	28.75	
C. H. Holthoff	P. Pt. N & W. DG & Sc. Rd. NW¼ SW¼	7.25	36.25	
C. H. Holthoff	P. Pt. Ery & SG Rd NW¼ SW¼	2.45	12.25	
Mrs. Laura Strong	P Pt. N. D. G. & Sc. Rd. NW¼ SW¼	.25	1.25	
Am. Bldg. & Loan Assn.	D. Pt. N. D. G. & Sc. Rd. NW¼ SW¼	1	5.00	
E. R. Collins	P. Pt. NW¼ SW¼	2.50	12.50	
C. H. Holthoff	P. Wry SE¼	42	210.00	
Mrs. Allen Biggs	D. Wry SE¼ SE¼	10	50.00	
D. V. Leatherman	P. Pt. NW¼	6.90		

[fol. 13] IN LINCOLN CHANCERY COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed May 7, 1938

Referring to the separate answer of A. J. Johnson and all other landowners similarly situated, the plaintiffs allege that none of the holders of the certificates of indebtedness issued by said District was made a party to the suit referred to in the answer of the said A. J. Johnson et al., and the decree therein was null and void because made without the presence before the court of the real parties in interest. Afterwards the State Bank & Trust Company of Wellston, Missouri, which was the holder of a large number of certificates of indebtedness issued by said District brought suit in the United States District Court for the Western Division of the Eastern District of Arkansas against the said Kersh Lake Drainage District, and in said suit recovered judgment on the 1st day of November, 1935, for $54,655; and thereupon it brought suit in the said United States District Court for a mandatory injunction to compel the Commissioners of the District to collect the taxes levied upon the assessment of benefits. The said District answered in said suit, denying that the assessments of benefits bore interest, and alleging that because they did not bear interest, the total amount of the assessment of benefits had been paid in full. This issue was submitted to the court on the 22nd day of December, 1936, and decided in favor of the plaintiff, the court holding that said assessment of benefits bore interest at the rate of six per cent per annum, so that the principal of said benefits has scarcely been touched, and practically the whole amount [fol. 14] of $292,191.90 remains due and unpaid; all of which will appear by a certified copy of the decree in said case, which is hereto attached as exhibit "A" and made a part hereof. The Kersch Lake Drainage District took an appeal from said decree to the United States Circuit Court of Appeals of the Eighth Judicial Circuit, where it was affirmed.

The plaintiffs therefore plead said decree as a conclusive adjudication of the point raised by the answer of the said A. J. Johnson, et al.

E. W. Brockman, Attorney for Plaintiff.

[fol. 15] EXHIBIT "A" TO AMENDMENT TO COMPLAINT

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

STATE BANK & TRUST COMPANY OF WELLSTON, MISSOURI, Plaintiff,

vs.

KERSCH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN and Desha Counties, T. H. Free, Claude H. Holthoff, and Emmett Warren, as Commissioners of Said District, L. T. Sallee, County Clerk of Jefferson County, N. M. Ryall, County Clerk of Lincoln County, N. D. Newton, County Clerk of Desha County, Garland Brewster, Collector of Jefferson County, W. A. Dodds, Collector of Lincoln County, and H. L. Clayton, Collector of Desha County, Defendants.

Final Decree

This cause coming on for final hearing, the plaintiff appears by Rose, Hemingway, Cantrell & Loughborough, its solicitors, and the defendants appear by Mr. E. W. Brockman, their solicitor, and the cause being submitted to the Court upon documentary evidence and upon the argument of counsel, the defendants asked the following declarations of law and fact:

[fol. 16] Findings of Fact

1. The assessment of benefits made and confirmed November 13, 1912 in the total sum of $293,191.90 in pursuance of Act 279 of the Acts of the General Assembly of the State of Arkansas for the year 1909 as amended by the Acts of 1911 were made payable over a period of twenty (20) years, and the postponed installments of benefits were to be paid in amounts maturing annually without interest.

2. The tax levied against said lands of the district to the amount of Thirty-nine Thousand ($39,000.00) Dollars forfeited for the non-payment thereof, and the lands sold, purchased by, and now are owned by the district.

3. That the assessment of benefits against a large portion of the lands of the district has been fully paid and the lien against said land discharged.

4. That the defendant district has caused a tax of six and one-half (6½) per cent to be levied against unpaid and unused benefits assessed against said lands and has caused the same to be extended upon the tax books, to be collected in the year 1937.

That the plaintiff seeks to require additional tax to be levied and collected from those lands, the original assessment on which lands has been fully paid and the lien thereon discharged.

Declarations of Law

1. That at the time of the organization of the defendant district and the making and confirmation of the assessment of benefits, the statute neither expressly nor impliedly provided that the postponed installments of betterments should bear interest, and no statute enacted since so provides.

2. That the plaintiff should be required to have sale made of all lands owned by the district, and proceeds arising therefrom applied to the satisfaction of its judgment, before an additional levy should be made against the benefits.

[fol. 17] 3. That the plaintiff under no circumstances, should have a mandatory injunction against the defendants, except to have a tax levied and extended against the unpaid assessment of benefits and against those lands wherein the assessment of benefits has not been fully paid.

4. The imposition of interest upon the postponed installments of betterments increases the original assessment made and amounts to the taking of property without due process and is in violation of the Constitution of Arkansas, Article 2, Section 8, and the Constitution of the United States, Article 14, Section 1.

5. That plaintiffs are not entitled to have the assessments of benefits raised to the amount of six per cent on the postponed installments of betterments, the right thereto having been barred by the three year statute of limitation.

6. That the court is without authority to fix a fee for plaintiff's attorneys on the contract sued on.

7. That each tract of land is liable only for the amount of the benefits originally made against the respective tract, and not liable for the total assessment against the whole district.

[fol. 18] These declarations were refused by the Court, and the defendants excepted. Thereupon the Court makes the following:

Findings of Fact

The plaintiff is a corporation duly organized under the laws of the State of Missouri.

The defendant district was, on the 24th day of August, 1912, duly organized by the Circuit Court of Jefferson County under the Act entitled "An Act to provide for the creation of drainage districts in this State," which was approved on the 27th day of May, 1909, as amended by Acts of 1911 and 1913.

The district embraces lands in Jefferson, Lincoln and Desha Counties. The Commissioners elected W. J. Parks as its engineer, and he made plans which were approved by the [fol. 19] Board. The Commissioners then made an assessment of benefits which amounted to $293,191.90, and which bore interest at the rate of six per cent per annum. The district let the work by contract, paying the contractors as the work progressed by negotiable certificates of indebtedness as authorized by Section 3623 of Crawford & Moses Digest. The total amount of the certificates of indebtedness issued amounted to $181,500.00, which were payable serially through the years 1920 to 1934. They were issued on engineers' estimates as the work progressed. These certificates of indebtedness bore interest at the rate of six per cent per annum and were negotiable instruments, payable to bearer.

It was first estimated that the work could be done for $135,000.00, and an annual tax was levied by the Circuit Court of Jefferson County of three per cent per annum, beginning at the annual collection of taxes on the first Monday of January, 1914. The taxes were collected at that rate from the year 1914 to 1916, inclusive. In that year the rate of taxation was raised to three and eight-tenths per cent per annum, and the taxes were collected at that rate from the year 1917 to 1919, inclusive. In 1920 the taxes were raised to six and five-tenths per cent, and they were collected at that rate through the years 1920 and 1021. They were then raised to eight and five-tenths per cent per annum, and collected at that rate through the years 1922 and 1923. They were then lowered to six and five-tenths per cent per annum, which, by the terms of the order of the Jefferson Cir-

cuit Court levying them, was to continue until the last of said certificates of indebtedness should be paid.

The plaintiff brought suit at law in this Court on a portion of said certificates of indebtedness. This suit was transferred to equity, and such proceedings were had in said cause that on the 1st of November, 1935, judgment was rendered therein in favor of the plaintiff for $54,655.00, which bears interest at the rate of six per cent per annum until paid.

[fol. 20] In addition to the amount of said judgment, Lillian Iddings, holding certificates of indebtedness of said district, numbered 211 to 214, inclusive, 242 to 245, inclusive, and 311 to 314, inclusive, each for $500.00, and one coupon for $50.00, has filed her intervention herein asking for the allowance of said claim, which is hereby allowed, and it is decreed that she have and recover of the defendant district the sum of $3,222.24 with interest thereon at the rate of six per cent per annum until paid.

[fol. 21] The defendant district paid all certificates of indebtedness as they matured annually up to 1929, when it ceased to pay the principal, but continued to pay the interest thereon up to August 1, 1932.

Nothing has been paid upon the judgment recovered by the plaintiff nor upon the certificates of indebtedness held by the intervener.

Upon this state of facts the court made the following:

Declaration of Law

The plaintiff and interveners are entitled to maintain this suit and to a mandatory injunction compelling the defendant commissioners and the defendant County Clerks and County Collectors to perform their duties in the collection of the drainage taxes upon the lands in suit.

It is Therefore, Considered, Ordered and Decreed that a mandatory injunction issue requiring the defendant County Clerks, N. M. Ryall and N. D. Newton to extend upon the tax books of their respective counties a tax of six and one-half per cent of the benefits assessed against each tract of land, railroad and tramroad in the district for each of the years 1936 and the following years until the whole of this decree has been satisfied, and that the said W. A. Dodds, as collector of Lincoln County, and H. L. Clayton, Collector of Desha County, be required to collect said drainage tax

along with the County and State taxes, and to pay the same over to the Clerk of this Court until the sums hereinbefore mentioned have been paid to the plaintiff and to the interveners.

It is Further Considered, Ordered and Decreed that the defendants, T. H. Free, Claude H. Holthoff and Emmett Warren, as Commissioners of said district be required to [fol. 22] institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary as commissioners of said district to insure the prompt collection of the drainage taxes; and the said Commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes.

It is Further Ordered that the said defendant commissioners pay out none of the funds of said district without an order of this court authorizing them to do so.

It is Further Ordered that said commissioners be required to file a report showing all sums collected and paid out by them since the day when the district defaulted in the payment of principal or interest; showing the number of bonds and coupons which they have purchased and the amounts paid therefor; what bonds or coupons of the district are or have been held by them, or any of them, individually or as members of the Board; whether any bonds held by them individually have been paid by the district, and, if so, when such payment was made and the amount thereof; and whether all bonds which have been paid with the funds of the District have been cancelled.

(Signed) John E. Martineau, Judge.

A true copy I certify:
Sid B. Redding, Clerk, By Sue Jones, Deputy Clerk.

[File endorsement omitted.]

Endorsed: "Filed Dec. 22, 1936. Sid B. Redding, Clerk."

[fol. 23] IN LINCOLN CHANCERY COURT

[Title omitted]

ANSWER TO AMENDMENT TO COMPLAINT—Filed May 12, 1938

The defendant denies that in the suit of A. J. Johnson against the plaintiff district that the holders of bonds of said district were either necessary or proper parties; that whether or not the State Bank & Trust Company of Wellston, Missouri obtained a judgment against the Kersh Lake Drainage District on the first day of November, 1935 for $54,655.00 would be material to the issues involved in this cause.

Furthermore, that if the United States District Court through its mandatory conjunction compel the Commissioners of the district to collect further taxes levied upon the benefits and it held in said order that the assessment of benefits bore interest and were therefore not paid and would likewise not be material in this issue so far as the complaint is concerned. That a decision by the Federal Court on this issue would be unnecessary and not material for the purpose of collecting said judgment because there was at all times mentioned in the pleadings hereof outstanding and uncollected assessment of benefits in favor of said district as follows:

A balance of the original assessment made in 1912	$52,119.40
To an additional assessment of 1924	53,082.22
Total outstanding benefits uncollected	$105,201.62

Wherefore, the defendants pray as in his original answer the prayer of the complaint be denied and for such other relief as in this court he is entitled.

A. J. Johnson.

[fol. 24] *Duly sworn to by A. J. Johnson. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 25] IN LINCOLN CHANCERY COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed June 30, 1938

The plaintiffs, by way of amendment to their complaint herein, say:

That on the 24th day of May, 1935, the State Bank & Trust Company of Wellston, Missouri, brought suit in the United States District Court for the Western Division of the Eastern District of Arkansas, seeking to recover judgment from the Kersh Lake Drainage District upon negotiable certificates of indebtedness issued by it to the contractors doing the work of improvement. Said District answered, setting up all the defenses which are now being urged in this case, and the defendant, Arthur J. Johnson, appeared in person and filed an intervention therein, setting up the same matters that are now being urged by him and the other landowners as a defense to this suit. Said case was transferred to the Chancery docket, and was brought to trial on the 1st day of November, 1935, with the result that all of the defenses now urged were overruled and a decree was entered in favor of the plaintiff for the sum of $54,655.00, as will appear by a transcript of all the pleadings and of the decree in said case herewith filed and marked exhibit "A" to this amendment.

[fol. 26] The said District appealed from said decision to the United States Circuit Court of Appeals of the Eight-Judicial Circuit. In said Court it urged as a defense to the proceedings all the matters now set up as defenses to this case, and such proceedings were had therein that the contentions of said District were overruled. Said decree was affirmed in an opinion rendered on the 27th day of August, 1936, as will appear by reference to 85 Fed. (2d) 643.

Thereupon on January 4, 1936, the said State Bank & Trust Company of Wellston, Missouri, brought suit in the United States District Court of the Western Division of the Eastern District of Arkansas, against the said Kersh Lake Drainage District, its commissioners and the county clerks and county collectors of said three counties, for the purpose of obtaining a mandatory injunction requiring the said commissioners to act as receivers of the said United States District Court, and to require the County Clerks to spread

the drainage tax levied by the Circuit Court of Jefferson County on behalf of the said District on the tax books of the respective counties and requiring the collectors of said counties to collect said taxes, and to pay them over under the orders of the court. The defendants appeared and set up as a defense to said suit all the matters which are now urged by the defendants herein, excepting such as had been adjudicated on the former appeal. Such proceedings were had therein that on the 29th day of December, 1936, said District Court entered its final decree, requiring the commissioners of the District to act as receivers of the court, and requiring the county clerks to enter the drainage taxes of said District upon the tax books of the respective counties, and requiring the collectors of said counties to collect said taxes and pay the proceeds over to the plaintiff, as will [fols. 27-64] appear by a certified transcript of all of said pleadings and decree, which is herewith filed as exhibit "B" and made a part hereof.

From said decree the parties defendant prayed an appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit where all of the defenses now set up in this case were presented fully to said Circuit Court of Appeals, which on the 23rd day of November, 1937, affirmed the decree of the court below as will appear by reference to its opinion, which is set forth at large in 92 Fed. (2d) 783.

The plaintiff, therefore, says that the foregoing decisions of the United States District Court for the Western Division of the Eastern District of Arkansas, and of the United States Circuit Court of Appeals for the Eight- Judicial Circuit constitute judgments binding upon said District and all the landowners therein, and upon the officials of said counties therein named, and their successors in office, and they plead said decrees as res judicata of all of the questions now sought to be raised by the defendants in this case.

E. W. Brockman & Rose, Hemingway, Cantrell & Loughborough, Solicitors for Plaintiff.

[fol. 65] EXHIBIT "A" TO AMENDMENT TO COMPLAINT

* * * * * * *

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity. #2788

STATE BANK & TRUST COMPANY OF WELLSTON, MISSOURI, Plaintiff,

vs.

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, T. H. Free, Claude H. Holthoff, and Emmett Warren, as Commissioners of Said District; L. T. Sallee, County Clerk of Jefferson County; N. M. Ryall, County Clerk of Lincoln County; N. D. Newton, County Clerk of Desha County; Garland Brewster, Collector of Jefferson County; W. A. Dodds, Collector of Lincoln County, and H. L. Clayton, Collector of Desha County, Defendants

BILL OF COMPLAINT

The plaintiff is a corporation duly organized and doing business under the laws of the State of Missouri. The defendant, Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties, is a local improvement district and a quasi corporation, duly organized under the laws of the State of Arkansas. The other defendants are all citizens of Arkansas and inhabitants of this division of this district.

The State Bank & Trust Company of Wellston, Relator herein, brought suit in this Honorable Court to recover judgment upon certain certificates of indebtedness issued by the Respondent, The Kersh Lake Drainage District. Said suit was brought on the law side of the Court, buy was duly transferred to the equity docket, and such proceedings were had therein that on the 1st day of November, 1935, the Court rendered a judgment in favor of the plaintiff for the sum of $54,655.00, which judgment is still in force and nothing has been paid thereon.

[fol. 66] Said District was duly organized on the 24th day of August, 1912, under the general Drainage Act of the State

of Arkansas, approved on the 27th day of May, 1909. It duly made an assessment of benefits amounting to $293,-191.90, and it issued negotiable certificates of indebtedness, bearing interest at the rate of six per cent per annum, to the contractors doing the work to the amount of $181,-500.00, which was the total cost of the improvements. By the terms of the Act under which the District was created, and also by the terms of Act #467 of the Acts of the General Assembly of the State of Arkansas of the year 1919, said benefits bore interest at the rate of six per cent per annum. Since the year 1924 the drainage taxes levied have been at the rate of six and one-half per cent. For a short time previous they had been at the rate of eight per cent, and prior to that time they had been three per cent, so that the total amount levied has not been in excess of the interest on the assessment of benefits. The total amount of drainage taxes paid is $268,766.35, which is not more than the interest upon said assessment of benefits. Nevertheless the said District and its commissioners have claimed that the assessment of benefits has been exhausted, and have instructed the County Clerks of the several counties aforesaid not to extend the taxes upon the tax books. In point of fact, the whole of said assessment of benefits remains still uncollected.

[fol. 67] The petitioner, therefore, prays for a mandatory injunction requiring the several county Clerks hereinbefore mentioned to extend the said taxes upon the tax books as required by the order — the *the* Circuit Court of Jefferson County entered on the 13th day of September, 1924, each year at the rate of six and one-half per cent until an amount has been collected sufficient to pay the judgment of the relator aforesaid; that the said collectors of the several counties be required to collect said drainage taxes each year until an amount has been raised sufficient to pay the judgment of the plaintiff with all costs, and that if any property owners fail to pay their drainage tax the defendant, Kersh Lake Drainage District, and its Commissioners be required to institute suit for the collection of the delinquent taxes, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decrees of foreclosure, and that they be required to do all things necessary as Commissioners of said District to insure the prompt collection of the drainage taxes; that said commissioners of said district be deemed receivers as

is provided in Act No. 46 of the Acts of the General Assembly of the State of Arkansas of the year 1933 and settled by the decision of the Supreme Court of said State in the case of Dickinson v. Mingea, decided on the 9th day of December, 1935; that all the defendants be required to perform their duties in the premises with due diligence and report their doings to this honorable court at times to be fixed by it; and for such other relief as may be deemed equitable.

Rose, Hemingway, Cantrell & Loughborough, by George B. Rose, Solicitors for Plaintiff.

A true copy I certify: Sid B. Redding, Clerk, by Sue Jones, Deputy Clerk. Filed Jan. 4th, 1936, Sid B. Redding, Clerk.

[fol. 68] IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

STATE BANK & TRUST COMPANY OF WELLSTON, MISSOURI, Plaintiff,

vs.

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, T. H. Free, Claude H. Holthoff, and Emmett Warren, as Commissioners of Said District, L. T. Sallee, County Clerk of Jefferson County, N. M. Ryali, County Clerk of Lincoln County, N. D. Newton, County Clerk of Desha County, Garland Brewster, Collector of Jefferson County, W. A. Dodds, Collector of Lincoln County, and H. L. Clayton, Collector of Desha County, Defendants

ANSWER

Come the defendants and for answer to the Bill of Complaint state:

That they deny each and every material allegation set out in said complaint.

Further answering the defendants state:

That they deny that the Kersh Lake Drainage District duly made an assessment of benefits amounting to $293,191.90, and that it issued negotiable certificates of indebt-

edness bearing interest at the rate of six per cent per annum to the contractors doing the work, to the amount of $181,500.00 which was the total cost of the improvement. They deny that under the terms of Act 476 of the Acts of the General Assembly of the State of Arkansas of the year 1919 said benefits bore interest at the rate of six per cent per annum.

They deny that since the year 1924 taxes levied have been at the rate of six and one-half per cent. They deny that for a short time previous they had been at the rate of eight per cent per annum, and prior to that time they had been [fol. 69] at the rate of three per cent, so that the total amount levied has not been in excess of the interest on the assessment of benefits.

Answering further the defendants state:

That at the time the original cost of the District was determined by a judgment duly rendered in the Jefferson Circuit Court, and benefits confirmed in a sufficient amount to pay said cost, said court did not in said judgment find that the assessment of benefits should bear interest, and having found that the amount of taxes levied was sufficient to pay the bonds to the amount of the cost of the improvement, plaintiffs are now barred from claiming interest upon said assessment and not having applied to the Court in apt time for the assessment and collection of interest under Act 467 of the Acts of the General Assembly of the State of Arkansas of the year 1919, they are now barred by the Statute of Limitations, and the defendants therefore plead the Statute of Limitations in bar of recovery.

Defendants further state that the taxes in an amount in excess of the sum necessary to pay the cost of the improvement, as determined by the Jefferson Circuit Court have been fully collected and paid, and that the plaintiffs are bound by the judgment made and rendered in Jefferson Circuit Court, and that the defendants have fully complied with the law relative thereto.

Having fully answered, defendants pray that the plaintiffs take nothing by reason of this action, and that defendants have judgment for their cost herein expended and for other general and proper relief.

E. W. Brockman, Attorney for Defendants.

Filed Jan. 21, 1936, Sid B. Redding, Clerk.

[fol. 70] IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

STATE BANK & TRUST COMPANY OF WELLSTON, MISSOURI, Plaintiff,

vs.

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, T. H. Free, Claude H. Holthoff, and Emmitt Warren, as Commissioners of Said District, L. T. Sallee, County Clerk of Jefferson County, N. M. Ryall, County Clerk of Lincoln County, N. D. Newton, County Clerk of Desha County, Garland Brewster, Collector of Jefferson County, W. A. Dodds, Collector of Lincoln County, and H. L. Clayton, Collector of Desha County, Defendants

AMENDMENT TO ANSWER

Come the defendants and after first obtaining leave of the Court files this amendment to the answer and for cause state:

First. That the defendant District was organized by an order of the Jefferson Circuit Court, and that on March 4, 1913 a judgment was rendered in said court fixing the estimated cost of the improvement and levied a tax upon the property of the District for the purpose of paying said estimated cost as follows:

Bond Issue	$135,000.00
Interest thereon	112,951.00
10% unforeseen contingencies	24,830.21
Total	$272,782.12

That said judgment levied a tax against the property of the District in the sum of $272,782.12 That said judgment appears of record in Civil Court Record Book "X" at page 350 of the Records of Jefferson County, Arkansas, reference to which is hereby made and same made part hereof.

Second. That under Section 3590 of Crawford & Moses' Digest of the Statutes of the State of Arkansas, which was the law at the time of the organization of the District, and at the time the assessment of benefits in the sum of $293,-

191.90 was made, and it was the duty of said court at the time, or within sixty days thereafter to fix the amount of interest to be borne by said installments of assessments not to exceed six per cent (6%). That the court did not [fol. 71] determine that it was necessary to collect interest on said installments of assessments, and did not fix a rate of interest thereon. That said court having failed to fix the rate of interest at the time of confirmation, or within sixty days after the confirmation of assessments, the plaintiffs herein and all others holding Certificates of Indebtedness issued by said District are barred by the limitation contained in Section 3590 of Crawford & Moses' Digest, and having delayed the request for more than twenty years, cannot now be heard to complain, and the defendant therefore pleads said Statute in bar of a recovery herein.

Third. That the plaintiff in its complaint invokes the aid of Act 467 of the Acts of the General Assembly of the State of Arkansas for the year 1919, which appears in Crawford & Moses' Digest as Section 3656. That said Act among other things provides that, "The interest need not be computed until necessary to be sure that the collections shall not exceed the total amount of benefits and interest; or the interests may be first collected." That on July 27, 1919 the commissioners, then acting on behalf of said defendant, issued Certificates of indebtedness in excess of the value of the assessed benefits and if plaintiff was ever entitled to the benefits provided by said Act, it became necessary to have the Jefferson Circuit Court determine the necessity for the collection of interest, if any, within sixty days after the passage of said Act, to-wit, March 28, 1919, and plaintiff having failed to invoke the benefit of said Act within the time provided by law is now barred by the limitation therein contained and defendants plead same in bar of a recovery herein. That said Act No. 467 of the Acts of the General Assembly for the year 1919 is unconstitutional and void for the reason that it is retroactive and seeks to deprive the owners of land in said District of their property without due process of law, and by imposing upon owners of said land obligations in excess of that which was imposed at the time of the organization of the District, and in pursuance of a petition seeking in the organization of said District.

[fol. 72] Fourth. Defendants further allege that Act 534 of the Acts of the General Assemble for the year 1921, Section 4 thereof, provides as follows: "No suit for the collection of delinquent taxes shall be brought after three years from date same became delinquent." The defendant pleads said Act 534 in bar of a recovery in this action.

Fifth. Defendants further allege that Section 12 of Act 279 of the Acts of the General Assemble for the year 1909 as amended and appearing in Crawford & Moses Digest as Section 3620 among other things contains the following: "Provided that the total levy or levies shall in no case exceed the value of the benefits assessed on said property, and the performance of such duties may be enforced by mandamus in the instance of any person or board interested." That the full value of the benefits assessed on all taxable property in the District has been levied, collected and legally (disbursed), and defendants therefore plead said Section 3620 of Crawford & Moses' Digest in bar of a recovery herein.

Sixth. That the commissioners of the defendant District have levied to date upon the value of the assessed benefits a total tax of $308,665.65, and that the amount of delinquencies at this date is approximately $39,899.30. That said commissioners have at regular intervals caused suits to be filed in the State Court for the purpose of selling the delinquent lands, and that at this time the District owns lands on which the assessment of benefits made, together with penalties and interest, amounts to $39,899.30. That said lands are held subject to the orders of the court for the payment of any obligations justly due from said District.

Seventh. That there has been levied and extended against the value of the assessed benefits in said District a total of One Hundred Eleven per cent (111%), and that as a result of said levy and extension of taxes a large number of tracts of land in the District have fully paid the entire value of assessed benefits against said lands and that said property owners obtained a decree in the Lincoln Chancery Court in the case of W. A. Fish, et al. vs. Kersh Lake Drainage District on June 15, 1932, enjoining and restraining the Com-
[fols. 73-76] missioners of the defendant District from levying or extending any tax against those lands, the assessed benefits of which has been fully paid. That said decree ap-

pears of record in Equity Record "I" at page 23 of the Records of Lincoln County, Arkansas, reference to which is hereby made and same made part hereof. The defendants furthe. plead that they have done and performed every act encumbent upon them by the law relative to the assessment, levy, collection and (dispursement) of taxes provided by law in said District, and that the plaintiff having delayed for a period of some sixteen years after its right accrued, if at all, is now barred by laches and defendant pleads same in bar of a recovery herein.

Wherefore premises considered, defendants pray that this amendment be taken and considered as part of the original answer herein filed, and for other general and proper relief.

E. W. Brockman, Attorney for Defendants.

Filed February 18th, 1936, Sid B. Redding, Clerk.

[fol. 77] IN LINCOLN CHANCERY COURT

[Title omitted]

DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDMENT TO COMPLAINT FILED 30TH DAY OF JUNE, 1938—Filed August 20, 1938

As answer to the amendment to the complaint of the plaintiff filed on June 30th, 1938 the defendant denies each and every material allegation in the amendment.

Defendant specifically denies that he appeared in a certain cause referred to in the complaint and set up as a defense to said suit wherein the State Bank and Trust Company of Wellston, Missouri and Kersh Lake Drainage District by its Board of Commissioners and others were defendants, all matters which are now urged by the defendant herein.

Pleading further defendant states that as an attorney he filed an intervention in a certain cause filed the 24th day of May, 1935 by the State Bank and Trust Company of Wellston, Missouri against Kersh Lake Drainage District in which the plaintiff sought a judgment on the certificates of indebtedness issued by the District. That the matters which are now urged by this defendant as defense to this suit were

not matters in response to the complaint of the plaintiff in said cause and could not and were not taken into consideration by the court. No issue could be made of the defenses now pleaded in said cause as is evidenced by the findings of the court and the decree rendered therein in November 1935. In said decree it was adjudicated that the defendant district was indebted to the said parties plaintiff in the sum of $54,655.00. This defendant denies that that judgment is [fol. 78] an adjudication of the questions herein involved offered as a defense in a suit to foreclose its tax lien. This defendant specifically denies any connection whatever in the cause referred to in the complaint as the State Bank and Trust Company of Wellston, Missouri brought in the United States District Court on January 4th, 1936 against the Kersh Lake Drainage District, et al.

Defendant denies that the judgment in said cause precluded the defense offered by the defense herein for the reason that *that* in that cause after same was submitted to the court upon the statement of facts that the defendant Kersh Lake Drainage District had no means to pay the judgment previously rendered by the court except from a delinquent tax list aggregating $38,899.35. This statement appears in the transcript paragraph 222 page 124 of cause No. 10,572 in the United States Circuit Court of Appeals. Whereas the facts and the truth of the records is heretofore answered by this defendant that at the time the foregoing suit was brought and at all times previous and subsequent thereto there remains outstanding and uncollected benefits of the District as follows:

Balance on original assessment made in 1912	$52,119.40
Additional assessment made in 1924	53,082.22
Total benefits outstanding and uncollected	$105,201.62

That the decree referred to by the plaintiff herein is not an adjudication of the issues involved in this defense but that by reason of the material variance in the facts constitutes a fraud on the District and other land owners in the District.

Defendant pleading further states as a defense to the tax now levied and involved in this suit that no additional or further levy of taxes has ever been made against his lands and none was made for the years set out in his complaint and the tax is therefore void. That the only levy of taxes in the

plaintiff District was made by the Jefferson Circuit Court and that the order of said court levying said tax was in words and figures as follows:

[fol. 79] IN THE JEFFERSON CIRCUIT COURT, MARCH TERM

No. 4552

D. HOPSON, et al., KERSH LAKE DRAINAGE DIST.,

vs.

EX PARTE

Tuesday, March 4th, 1913.

"In the matter of the assessment of a tax upon the real property, the Railroads, Tram roads, corporate and Public roads in the Kersh Lake Drainage (Drainage) District of Jefferson, Lincoln and Desha Counties, Arkansas, for a sum sufficient to pay the improvement in said District with ten per centum added for unforseen contingencies.

"The Commissioners of said District having called upon the Circuit Court of Jefferson County, Arkansas, to assess a tax upon the real property, railroads, tram roads, corporate and public roads of the Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties, Arkansas, which tax shall be sufficient to pay the estimated cost of the improvement with ten per cent. (10%) added for unforseen contingencies and to be paid by the real property, railroads, tram roads, corporate and public roads in the district in the proportion to the amount of the assessment of the benefits thereon.

"Now, therefore it is hereby considered, ordered and adjudged by the Circuit Court of Jefferson County, Arkansas, that there shall be assessed upon the real property the railroads, tram roads, corporate and public roads of the Kersh Lake Drainage District a tax of $272,782.12, which is the estimated cost of the improvement in said drainage district, being the bond issue, $135,000.00 with the accrued interest thereon with ten per centum (10%) added for unforseen contingencies, which tax is to be paid by the real property, railroads, tram roads, corporate and public roads in said district in the proportion to the amount of the assessment of benefits thereon, and which tax shall be a lien upon all the real property, railroads, tram roads, corporate and public

roads in said district from this date and shall be entitled to preference over all demands, executions, encumbrances or liens whatsoever created, and shall continue until such assessments with any penalty and costs that may accrue thereon shall have been paid."

Defendant pleading further states that if he is in error in the District's authority to increase his betterment and increase his taxes that he should have a statement of the amount of such increase, a statement showing the total increase, the increase made and the balance due and an opportunity to pay before a judgment is rendered and his property sold.

Wherefore, the defendant prays that in addition to the prayer in his original answer and the amendment thereto the prayer of the complaint be denied; that if he is in error in the authority of the District to increase his taxes that he be given a statement showing the increase, and for such other relief as in this court he is entitled.

A. J. Johnson, Attorney.

[fol. 80] *Duly sworn to by A. J. Johnson. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 81] EXHIBIT TO ANSWER

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHT- CIRCUIT, MAY TERM, 1936

No. 10572

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS, Appellant,

vs.

STATE BANK AND TRUST COMPANY OF WELLSTON, MISSOURI

Appeal from the District Court of the United States for the Eastern District of Arkansas

Monday, August 31, 1936.

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that the State Bank and Trust Company of Wellston, Missouri, have and recover against the Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties, Arkansas, the sum of Twenty Dollars for its costs herein and have execution therefor.

August 31, 1936.

A true copy:

Attest:

E. E. Koch, Clerk, U. S. Circuit Court of Appeals, Eight- Circuit.

[fols. 82-84] EXHIBIT TO ANSWER

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHT- CIRCUIT, NOVEMBER TERM, 1937

No. 10879

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS, et al., Appellants,

vs.

STATE BANK AND TRUST COMPANY OF WELLSTON, MISSOURI

Appeal from the District Court of the United States for the Eastern District of Arkansas

Tuesday, November 23, 1937.

This cause came on to be heard on the tramscript of the record from the District Court of the United States for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is thereby, affirmed with costs; and that State Bank and Trust Company of Wellston, Missouri, have and recover against Kersh Lake Drainage District of Jefferson, Lincoln, and Desha

Counties, Arkansas, et al., the sum of Twenty Dollars for its costs herein and have execution therefor.

November 23, 1937.

A true copy:

Attest:

E. E. Koch, Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

Filed August 27, 1938. Homer L. Johnson, Clerk.

[fol. 84a] IN LINCOLN CHANCERY COURT

[Title omitted]

AMENDMENT TO SEPARATE ANSWER OF A. J. JOHNSON—Filed January 16, 1938

The defendant is the owner of the S. W. ¼ of Section 8, township 9 south, range 5 west, in Kersh Lake Drainage District. The benefits to accrue to this land were assessed in 1912 at $1600, The Defendant paid the full amount, $1600, prior to 1931.

In 1931 the commissioners raised the assessment on the defendant's land, pretending to do so under the authority of Act No. 177 approved March 13, 1913, and Act No. 467, approved March 28, 1919, and levied a tax on the increase. In a suit brought by defendant against the district, the Chancery court of Lincoln county found and held, on the pleadings and evidence, that the total possible benefit accruing to defendants land was $1600, that this amount had been paid in full and that the additional assessment was null and void. The court rendered a decree perpetually enjoining the district from assessing any additional benefits on defendants land, and from collecting any further drainage taxes from such land, The defendant pleads this decree as res adjudicata of the total amount of benefits accruing to defendant's land, and of the payment of such benefits in full.

At the same time and by the same authority, the commissioners raised the assessments of benefits on other lands of this defendant and the lands of other owners similarly situated in the district and levied a tax on the increase. In

a suit brought by W. A. Fish and others against the district, the chancery court of Lincoln county found and held on the pleadings and evidence the total possible benefits accruing to each separate parcel of land and the amount so found by the court was paid; said lands are specifically and correctly described in the decree with the amount of benefits made a part hereof; the court rendered its decree enjoining the district from collecting additional Benefits on [fol. 84aa] said lands. Defendant pleads the decree rendered by the chancery court as res adjudicata of the total amount of benefits to all lands specifically described in said decree and the payment of said benefits in full. Copies of said decrees are attached to the original answer herein.

The mandatory injunction issued by the federal court merely directed the board of commissioners to collect a tax of 6½ per cent on the assessed benefits in the district. There are benefits on the defendants land or the land of other owners herein set out. The order of the federal court therefore, does not affect the defendants land or other lands similarly situated and does not purport to affect it and it furnished no authority to the district to levy a tax on the defendants land. The collection of such a tax would deprive the defendant and others of property without due process of law in violation of the state and federal constitutions.

Copy of the mandatory injunction of the federal court is attached.

Wherefore defendant prays that the complaint as to his lands and the other lands herein described be dismissed and form costs.

A. J. Johnson.

[File endorsement omitted.]

[fol. 84b] Exhibit to Amendment to Answer

It is therefore considered, ordered and decreed that a mandatory injunction issue requiring the defendant county clerks, N. M. Ryall and N. D. Newton to extend upon the tax books of their respective counties a tax of six and one-half percent of the benefits assessed against each tract of land, railroad and tramroad in the district for each of the

years 1936 and the following years until the whole of this decree has been satisfied, and that the said W. A. Dodds as collector of Lincoln county, and H. L. Clayton, collector of Desha county, be required to collect said drainage tax along with the county and state taxes, and to pay the same over to the clerk of this court until the sums hereinbefore mentioned have been paid to the plaintiff and to the interveners.

It is further considered ordered and decreed that the defendants T. H. Free, Claud H. Holthoff and Emmet Warren, as commissioners of said district be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary as commissioners of said district to insure the prompt collection of the drainage taxes; and the said commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes.

It is further ordered that the said defendant commissioners pay out none of the funds of said district without an order of this court authorizing them to do so.

It is further ordered that said commissioners be required to file a report showing all sums collected and paid out by them since the day when the district defaulted in payment of principal or interest; showing the number of bonds or coupons which they have purchased and the amounts paid therefor; what bonds or coupons of the district are or have been held by them of any of them, individually or as members of the board; whether any bonds held by them individually have been paid by the district, and, if so, when such payment was made and the amount thereof; and whether all bonds which have been paid with the funds of the district have been cancelled.

John E. Martineau, Judge.

December 22, 1936.

[fols. 85-116] EXHIBIT TO DISPOSITION OF VICTOR FELLY

The original assessment of benefits made November 12th, 1912 for the Kersh Lake Drainage District was:

$293,191.90

A supplemental assessment of benefits for Kersh Lake Drainage District District made in 1924 is in the sum of $53,082.22

The audit of the affairs of the Kersh Lake Drainage District by J. Doyle Windsor and F. V. McCoy for the State Comptroller on September 13, 1935 shows the following summary to-wit.:

Assessed Benefits	$310,533.85
Taxes levied to date	308,655.65
Delinquent	39,899.30
Assessed Benefits unpaid	52,119.40
Assessed Benefits overpaid	10,351.90
Tax Levied for Collection, 1935	3,100.12

Victor Felly.

[fol. 117] IN LINCOLN CHANCERY COURT

No. 2046

BOARD OF COMMISSIONERS OF THE KERSH LAKE DRAINAGE DISTRICT, Plaintiff,

vs.

DELINQUENT LANDS, Defendant

AMENDED DECREE—February 22, 1939

Now on this the 16th day of January, 1939, a regular adjourned day of the Lincoln Chancery Court for the October, 1938 term, this cause comes on to be heard and comes the plaintiff Board of Commissioners of the Kersh Lake Drainage District by its attorney, E. W. Brockman, of Pine Bluff, Arkansas; and A. J. Johnson appears on behalf of himself and certain other property owners claiming an interest in certain lands mentioned and set out in the separate answer of A. J. Johnson, and no one appearing on behalf of the

other delinquent lands hereafter mentioned or any of them, and no demurrer or pleading having been filed herein by any person other than A. J. Johnson claiming any interest in said lands or any of them, which said lands are hereafter particularly set forth: said cause is heard upon the complaint filed, proof of publication of the notice of and advertisement of said lands, the certified list of delinquent lands filed by the Collector of Lincoln county, Arkansas for the years 1935 and 1936; tax records including said lands for said years; separate answer of A. J. Johnson, with certified copies of the decrees of the Lincoln Chancery Court in the case of A. J. Johnson versus Kersh Lake Drainage District, and in the case of W. A. Fish et al. versus Kersh Lake Drainage District, attached as exhibits to said answer, together with all amendments thereto; and the written statement of Victor Felley; from all of which the court finds:

That C. H. Holthoff, Emmet Warren and T. H. Free are the duly elected, qualified and acting commissioners of the Kersh Lake Drainage District:

That a list of delinquent lands embraced in the Kersh Lake Drainage District showing the supposed owner as the same appears upon the tax books, a description of the prop- [fol. 118] erty and the amount of tax due thereon for the years 1935 and 1936, was duly certified by the Clerk of the County Court of Lincoln County, Arkansas and filed by the Collector of Lincoln County, Arkansas with the Circuit Clerk of said county, and said certified list of delinquent lands was filed with the complaint herein.

That this action has been conducted in the name of Board of Commissioners of Kersh Lake Drainage District; that the published notice of the pendency of this suit was made in the name of Board of Commissioners of Kersh Lake Drainage District vs. Delinquent Lands as required by statute; and that due notice of the pendency of this suit and action has been given by publication weekly for four weeks consecutively before this judgment and decree is entered for the sale of said lands, in the Lincoln Ledger, a newspaper published in Lincoln County, Arkansas, which published notice was in the form required by law and was published for the time and in the manner as required by law as shown by the proof of publication herein duly made by the affidavit of Clyde Grumbles, editor and publisher of said paper, which affidavit shows the dates of the several publications of said notice as therein stated, and at the said period and

at the said dates the said Lincoln Ledger was a newspaper printed and having a bona fide circulation in Lincoln County, Arkansas for a period of more than twelve months next before the date of the first publication of this notice, and that said notice was published weekly in the regular issue in the said Lincoln Ledger for four consecutive weeks, the first publication thereof having been made on November 4th, 1938, the second publication thereof having been made on the 11th day of November, 1938, the third publication thereof on the 18th day of November, 1938, and the fourth publication thereof on the 25th day of November, 1938; said notice stating that all persons, firms or corporations having or claiming any interest in the lands and property therein described were notified that suit was pending in the Lincoln Chancery Court to enforce the collection of said delinquent taxes due said Kersh Lake Drainage District on the list of lands and property hereinafter set forth for the years 1935 and 1936, both inclusive, as shown by the years designated [fol. 119] under each tract or parcel of land and property as mentioned in the complaint, the name of the supposed owner having been set opposite his, her or its land together with the amount due from each tract or parcel of land as drainage tax from the years 1935 and 1936, both inclusive, as shown by the years designated by each parcel or tract of land and property as mentioned in the complaint, together with the penalty of twenty-five (25%) per cent thereon as provided in the Act of the General Assembly of the State of Arkansas, under which the Kersh Lake Drainage District was formed and created, same being Act 279 of the Acts of the General Assembly of the State of Arkansas for the year 1909, and acts amendatory thereof; all of said lands being in Lincoln county, Arkansas, and said notice warning all persons and corporations interested in said lands that they were required to appear within four weeks and make defense to this suit or that the same would be taken for confessed and final judgment be entered directing the sale of said land for the purpose of collecting said delinquent tax, together with the payment of interest, penalty and costs allowed by law, said notice being given under the hand of the Clerk of the Lincoln Chancery Court and under the seal of his office, and was in all things as required by law.

And the court further finds that since the filing of the complaint herein separate answer was filed by A. J. Johnson, claiming to be the owner of the following tract of land

lying and being situated in the county of Lincoln and state of Arkansas, to-wit:

Southwest quarter (SW¼) of Section Eight (8) Township nine (9) South, Range Five (5) West;

it being contended in said answer that the total amount of the original assessed benefits against said lands had been fully paid; that the postponed installments of benefits so assessed did not bear interest and that the lien created against said land by the original assessment of benefits had been fully discharged, in said answer the said A. J. Johnson also contended that the decrees in the cases of A. J. Johnson versus Kersh Lake Drainage District and W. A. Fish et al. versus Kersh Lake Drainage District were res judicata of the issues in this suit. Said answer also contained a prayer for relief for the owner of said land and for [fol. 120] the owners of other lands similarly situated.

The court further finds that certain tracts of land were erroneously included in said complaint and that the taxes assessed against other certain tracts have been paid since the filing of the complaint.

Now, therefore, it is by the court considered, ordered, adjudged and decreed that the complaint herein filed be and the same is hereby dismissed so far as it affects those tracts and parcels of land on which the tax has been paid since the filing of the complaint and as to other tracts and parcels of land erroneously included in said complaint.

The court finds all of the issues against the said A. J. Johnson and other property owners similarly situated, which said issues were set out in the answer filed by A. J. Johnson and amendments thereto.

It is further by the court ordered, adjudged and decreed that the complaint as to any and all of the remaining tracts and parcels of land, except those dismissed for the reason that the tax thereon has been paid since the filing of the suit and those tracts erroneously included in said complaint, therein described and as herein-mentioned be and the same is hereby taken as confessed, and the relief prayed for in said complaint be and the same is hereby in all things granted and the amounts now due the plaintiff by the several tracts of land hereinafter particularly set forth for taxes, penalty and interest at six (6%) per cent per annum as mentioned, be and the same is hereby declared to be justly due and declared and fixed as a first lien upon the

lands against all persons having any interest therein, and an attorney's fee in the sum of One ($1.00) Dollar per tract for each tract or parcel of land hereafter set forth is hereby fixed in favor of plaintiff's attorney and taxed as a part of the costs and is also declared a lien upon the lands hereinafter mentioned; and the Clerk of this Court, C. I. Leek, is hereby appointed Commissioner of this court and is hereby authorized and directed to proceed to sell the lands and property described in the complaint and as hereinafter set forth, on the day to be fixed by the Commissioner, for the purpose of enforcing the collection of the [fol. 121] drainage tax, penalty, interest and costs due said Kersh Lake Drainage District for the years 1935 and 1936, as shown by the years designated under each tract or parcel of land and property as mentioned in the complaint, at the west door of the courthouse in the town of Star City, Lincoln County, Arkansas, at public outcry to the highest and best bidder for cash in hand paid, after advertising said sale as provided by law, which advertisement shall include all of the lands hereinafter described in this decree weekly for two weeks consecutively in some newspaper published in Lincoln County, Arkansas; and if all of said lands are not sold on the day advertised for said period, then said sale shall continue from day to day until all of the lands are sold, and said commissioner shall by proper deed convey to the purchaser the lands so sold, and the title to said lands so sold shall become vested in the purchaser against all others whomsoever, saving as to infants and insane persons having no guardian or curator the right they now have by law to appear and except to said sale within the time fixed by law after their disabilities are removed, and provided that within two years after the rendition of this decree the owner of any of said lands herein can file his petition in said court as provided by law alleging the payment of taxes on the lands for the years for which they were sold, and upon the establishment of this fact have the decree vacated and set aside as to those lands, and further provided that the owners of any of said lands may have the right to redeem any and all of said lands sold at such sale for and during the period fixed by law for redemption.

In case the sum of taxes due together with penalty, interest and costs on said several tracts or parcels of land is not bid for same at sale, the Commissioner is hereby directed to bid off the same in the name of the Kersh Lake

Drainage District, bidding therefor the whole amount due, and in such cases he shall execute his deed therefor conveying such land to the Kersh Lake Drainage District and such deed when duly executed and delivered shall be received as evidence in all cases of an indefeasable title in such purchaser unassialable either in law or equity as provided by [fol. 122] law.

The lands herein referred to together with the name of the supposed owner of the same, the description thereof by parcel, the tax, penalty and interest thereon and total sum due exclusive of attorney's fee, Commissioner's fee and costs, all of said lands being situated in the county of Lincoln, state of Arkansas, are as follows, to-wit:

(for description of lands, see original)

It is further ordered, adjudged and decreed that the Commissioner herein appointed be allowed as compensation for his services herein the sum of One ($1.00) Dollar on each tract sold as mentioned and set out in this decree.

Said Commissioner shall report his actions hereunder to this court as soon as may be for further orders, if any, as may be deemed proper in the premises, and the court retains jurisdiction of this cuase for the purpose of protecting the rights of all parties hereto and of such parties as may be made parties hereafter.

It is further considered, ordered and adjudged that the plaintiff is hereby awarded writ of possession, and the clerk of the court is directed to issue the same for the purpose of enforcing this decree and placing the plaintiff in possession of lands sold and deeded to it by the Commissioner appointed to carry into effect the decree of the court.

The defendant, A. J. Johnson, at the time excepts to the findings and rulings of the court and prays an appeal to the supreme court of the state of Arkansas, which is hereby granted.

Harry T. Wooldridge, Chancellor.

February 22, 1939.

[fol. 123] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 124] IN SUPREME COURT OF ARKANSAS

No. 5501

A. J. JOHNSON, Appellant,

v.

KERSH LAKE DRAINAGE DISTRICT, Appellee

Appeal from Lincoln Chancery Court

JUDGMENT—May 29, 1939

This cause came on to be heard upon the transcript of the record of the chancery court of Lincoln County and was argued by solicitors; on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: The court erred in holding the lands of appellant subject to an additional tax.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court with directions to enter a decree not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellant recover of said appellee all his costs in this court in this cause expended, and have execution thereof. Smith, McHaney and Baker, JJ., dissent.

[fol. 125] IN SUPREME COURT OF ARKANSAS

JOHNSON

v.

KERSH LAKE DRAINAGE DISTRICT

OPINION—May 29, 1939

HOLT, J.:

Appellants bring this appeal from the Lincoln Chancery Court.

The Kersh Lake Drainage District, embracing lands in Jefferson, Lincoln and Desha counties, was created by an

order of the circuit court of Jefferson county on August 24, 1912 under Act 279 of 1909. Benefits were assessed against each tract of land in the district in the total sum of $272,782.12, payable in annual installments. A contract for the improvement was let, the work completed and certificates of indebtedness issued to the contractor in payment.

A. J. Johnson, one of the appellants, owned and still owns 160 acres of land in this district and the benefits to which were originally assessed at $1600. Prior to 1931 he had paid installments of these tax benefits in the total sum of $1628.00. The other appellant landowners to this litigation paid the full amount of benefits originally assessed against their lands, but counsel have agreed that such appellants will abide the decision of this court with reference to the Johnson land as controlling as to these other appellants.

In 1931 the Commissioners of this district, acting upon the authority of act 467 of 1919, made an additional assessment against the lands in question, such assessment being the interest on the original assessment as contemplated in the act. This tax levied as additional assessment, on the Johnson land, amounted to $104.

A suit was then filed by Johnson in the Lincoln Chancery Court against the district in which he alleged that the limits of the benefits accruing to his 160 acres of land in the district, amounted to $1600, and prayed that the additional [fol. 126] of benefits made under act 467, supra, be annulled. On October 19, 1931, the court found the issues in favor of Johnson and held that all legally assessed benefits had been paid, annulled the additional assessment, and permanently enjoined the district from collecting any additional taxes on Johnson's land. From this judgment of the court no appeal was taken.

The other appellants here brought a similar suit against the district, praying for similar relief to that granted Johnson, which prayer the court granted on June 15, 1932, and from this judgment of the court no appeal was taken.

The State Bank & Trust Company of Wellston, Missouri, in 1935 filed a suit at law against the Kersh Lake Drainage District in the Federal Court for the Eastern District of Arkansas, in Little Rock, in which it sought to recover a judgment against the district on certain of its certificates of indebtedness which had been assigned to it by the contractor. In this cause the Federal District Court entered a judgment in favor of the trust company against the dis-

trict for $54,655 and this judgment was subsequently affirmed by the Circuit Court of Appeals, (Kersh Lake Drainage District v. State Bank & Trust Company, 85 Fed. 2d 643).

Thereafter the State Bank & Trust Company instituted suit in the Federal Court in Little Rock against the same Commissioners of this same district, joining the county clerks and sheriffs of Jefferson, Lincoln and Desha counties, asking for a mandatory injunction to compel the collection of a tax of 6½ per cent a year on the assessed benefits in the district to pay this judgment. The court issued the mandatory injunction as prayed for as follows: "It is, therefore, considered, ordered and decreed that a mandatory injunction issue requiring the defendant county Clerks, N. M. Ryall and M. D. Newton, to extend upon the tax-books [fol. 127] of their respective counties, a tax of 6½ per cent of benefits assessed against each tract of land, railroad, and tramroad in the district for each of the years 1936 and the following years until the whole of this decree has been satisfied. * * * It is further considered, ordered and decreed that the defendants, T. H. Free, Claude H. Holthoff and Emmett Warren, as Commissioners of said district, be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary, as Commissioners of said district, to insure the prompt collection of the drainage taxes." This judgment of the court was affirmed by the Circuit Court of Appeals, (Kersh Lake Drainage District v. State Bank & Trust Company, 92 Fed. 2d 783).

In accordance with the provisions of this mandatory injunction the County Clerk of Lincoln County extended a tax of 6½ per cent on the original assessment of benefits of $1600 against Johnson's 160 acre tract in this county. Johnson refused to pay this tax and the assessment against his lands was returned delinquent.

The Kersh Lake Drainage District filed the present suit in the Lincoln Chancery Court pursuant to the order of the Federal Court to collect the delinquent tax against Johnson's land and the delinquent assessments against the other appellants to this litigation. In his answer Johnson alleged that the tax sought to be collected was void and set up as a complete bar the decree of the Lincoln Chancery Court ren-

dered on October 19, 1931, supra, in the former suit brought by him against the district, pleading res judicata. He also alleged that his lands were not embraced within the terms of the mandatory injunction for the reason that the injunction [fol. 128] directed the county clerk to extend a tax on the assessed benefits in the district, and that there were no unpaid "assessed benefits" against his land. The other appellants here made similar allegations in their answer with respect to their lands and also pleaded the decree rendered by the Lincoln Chancery Court on June 15, 1932, in their favor, as res judicata. The chancery court overruled the defenses set up by these appellants, entered a decree for the taxes and ordered the lands sold to satisfy them. The trial court was of the opinion that it was precluded by the Federal Court's order from considering any of the defenses interposed by Johnson or the other appellants.

The decree of the Lincoln Chancery Court, heretofore referred to, in the cause in which appellant, A. J. Johnson, was plaintiff and Kersh Lake Drainage District was defendant, and rendered on October 19, 1931, recites, among other things, the following: "The court being advised as to the law and facts in the premises, finds that the plaintiff is the owner in fee of the SW¼ of Section 8, Township 9 South, Range 5 West; that said lands constitute a part of the Kersh Lake Drainage District of Jefferson, Lincoln and Desha counties, that said drainage district was organized by the judgment of the Jefferson Circuit Court on August 24, 1912, under Act No. 279 of the Acts of 1909, and that said land was assessed benefits of $1600 by the assessors of said Kersh Lake Drainage District and said assessment of benefits was duly confirmed by the judgment of the circuit court of Jefferson county on February 3, 1913; that subsequent to the confirmation of the assessment of benefits, taxes were annually extended against plaintiff's said land, and from January 1, 1914, to and including the year 1929, payable in 1930, the plaintiff paid a tax in favor of Kersh Lake Drainage District and as a credit on the assessments of benefits made and confirmed against his land the total sum of $1628.00; that the defendant commissioners over the protest of the plaintiff extended a total and further tax of $104 for the [fol. 129] year 1930, payable in 1931, in favor of the Kersh Lake Drainage District, and the plaintiff has refused to pay and the foregoing described lands have been certified by the collector of Lincoln county to the chancery court of

Lincoln County as delinquent for said amount, and said commissioner is about to sell said land for said delinquency.

"The court further finds that upon the payment by the plaintiff of the total assessed benefits in favor of Kersh Lake Drainage District in the sum of $1600 against the SW¼ of Section 8, Township 9 South, Range 5 West, all of the lien, right or interest of the Kersh Lake Drainage District against said lands by virtue of the improvement made by the Board of Commissioners in and for the Kersh Lake Drainage District became duly paid and satisfied, and the Commissioners are without authority to extend further taxes against plaintiff's land collectible in the year 1931, or any other years.

"It is, therefore, considered, ordered and decreed that the lien of the Kersh Lake Drainage District against the SW¼ of Section 8, Township 9 South, Range 5 West, by virtue of its assessment of benefits in the sum of $1600 is fully satisfied and released; that the tax extended by the Commissioners for 1930, collectible in 1931, is without authority and void, and the clerk of this court shall satisfy the record of the delinquent lands returned to him in 1931 as far as SW¼ of Section 8, Township 9 South, Range 5 West, is concerned, and the defendant Commissioners are permanently restrained from extending other and further taxes against the plaintiff's said land * * *".

The decree in the cause of W. A. Fish and others (the other appellants in the instant case) and Kersh Lake Drainage District which was entered on June 15, 1932, is similar in effect.

In the instant case the decree of the lower court is in part as follows: "* * * said cause is heard upon the com- [fol. 130] plaint filed, proof of publication of the notice of the advertisement of said lands, the certified list of delinquent lands filed by the collector of Lincoln County for the years 1935 and 1936, tax records including said lands for said years, separate answer of A. J. Johnson, with certified copy of the decree of the Lincoln Chancery Court in the case of A. J. Johnson v. Kersh Lake Drainage District and in the case of W. A. Fish, et al., v. Kersh Lake Drainage District attached as exhibits to said answer, together with all amendments thereto, and the written statement of Victor Felly, from all of which the court finds: * * *

"And the court further finds that since the filing of the complaint herein, separate answer filed by A. J. Johnson,

claiming to be the owner of the following tract of land lying and being situated in the county of Lincoln and State of Arkansas, to wit: Southwest quarter (SW¼) of Section eight (8), Township nine (9) South, Range five (5) West, it being contended in said answer that the total amount of the original assessed benefits against said lands had been fully paid; that the postponed installments of benefits so assessed did not bear interest and that the lien created against said land by the original assessment of benefits had been fully discharged. In said answer the said A. J. Johnson also contended that the decrees in the cases of A. J. Johnson v. Kersh Lake Drainage District and W. A. Fish, et al., v. Kersh Lake Drainage District were res judicata of the issues in this suit. Said answer also contained a prayer for relief for the owner of said lands and for the owners of other lands similarly situated. • • •

"The court finds all of the issues against the said A. J. Johnson and other property owners similarly situated, which said issues were set out in the answer filed by A. J. Johnson and amendments thereto."

The decree then adjudicates that the taxes levied on the [fol. 131] lands of A. J. Johnson and the other answering defendants were delinquent and ordered the Commissioners to sell the lands to satisfy the taxes. From this decree of the court comes this appeal.

Appellants state the issue before us in the following language: "The question in this case is whether or not a decree, in a suit by a landowner against a drainage district, adjudicating that the owner had paid the full limit of benefits accruing to his land, and perpetually enjoining the district from collecting any more taxes on it, is res judicata in a subsequent suit by the district to collect additional taxes on the land, brought in obedience to an order of the Federal Court directing the County Clerks of three counties 'to extend upon the tax-books of their respective counties a tax of 6½ per cent of the benefits assessed against each tract of land' in the district, to pay a judgment rendered in that court against the district".

We are of the view that the judgment of the Lincoln Chancery Court in favor of Johnson on October 19, 1931, and that rendered in favor of the other appellants on June 15, 1932, are res judicata in the present suit brought by the district against these same parties to collect additional taxes

on their lands brought in obedience to an order of the Federal Court.

In this case the appellee, drainage district, has sued appellants for drainage taxes alleged to be due from them to the district. These appellants defend upon the ground that they have already paid in full all the tax benefits assessed against their lands and that they have done all that the law requires of them. In support of their position, appellants set up specifically, as res judicata of the issues here, the former decrees in 1931 and 1932, supra, in the same court from which this appeal comes, in which the same parties were involved, involving the same taxes, and in which it was [fol. 132] adjudicated that they had paid in full the taxes lawfully assessed against them. They insist, and we think correctly so, that these decrees in a suit between the same parties, involving the same issues and the same subject matter are res judicata of the questions involved in the instant case.

As we view it, the power of the Federal Court to make the mandatory order, which it made, is unquestioned, but the effect of this order was a direction to the Commissioners of the drainage district to institute proper proceedings, in the proper state court, to enforce the payment and collection of all delinquent taxes assessed against the property owners in the district as a class, who were delinquent on their assessed benefits. The effect of this Federal Court order was not to deprive the individual taxpayer and landowner of any right that he might have in the state court to resist collection of the additional tax assessed against his particular lands. Each taxpayer was entitled to be heard not only upon the validity of the tax levied, but also upon the amount of the tax. The mere fact alone that the Federal Court directed the appellee district to bring the present suit in the state court, was a recognition by the Federal Court of the power of the state court to decide the issues involved. The Federal Court order directed the county clerks of the counties in which the lands in question in the district were located to extend a tax of 6½ per cent of the benefits assessed against each tract and directed the appellee district to bring suit for the collection of these taxes. If the clerks erroneously extended such taxes and the district brought the suits to collect non-existent taxes under a mistaken conception of the scope of the Federal Court order, the appellants lose no right of defense. They

could make the same defenses against such suits as they would have been entitled to make had the Commissioners brought the suits without orders from the Federal Court. [fol. 133] It was not the purpose of the Federal Court to enforce the collection of taxes in this district after they had been paid, or to exact benefits in excess of those lawfully assessed against appellants' property. As we view it the Federal Court suit, in which the certificate holders secured a judgment against the district, appellee, did not involve the validity of the assessments against the appellant landowners. It simply involved the liability of the district to the holders of the certificates. The Federal Court correctly held the district liable to the bondholders but the effect of that holding does not deny to the individual taxpayer the right to resist the collection of the tax in question.

In the present case appellants are not resisting the order of the Federal Court directing the district to assess and collect a tax. They concede the validity of that order and the duty of the district and its officers to obey it. These district officers have levied the tax and have brought suit to collect it against the property owners in the district, as a class, who have not paid the tax, but not against appellants who have actually paid the tax as shown by the judgment of a state court of acknowledged jurisdiction.

In the case of State of Arkansas for the use and benefit of Craighead County v. St. Louis-San Francisco Railway Company, 269 U. S. 172; 46 Sup. Ct. 66, the facts were that the Maccabees secured a judgment in the Federal Court in Craighead County on certain county warrants. In aid of this judgment the Maccabees instituted mandamus proceedings and the Federal Court made an order directing the taxing officials to assess at full money value all property in Craighead County and to continue said assessment until the judgment of the plaintiff had been paid in full. The assessment was made by the taxing authorities in attempted compliance with the order of the Federal Court.

Thereafter the State of Arkansas for the use and benefit [fol. 134] of Craighead County sued two railroad companies for the collection of the taxes as assessed under the order of the Federal Court. These companies defended on the ground that the assessment ordered by the Federal Court was not properly made and, therefore, in violation of the State Constitution. The state court sustained their defense

and this decision was affirmed by the Supreme Court of the United States in which it held, quoting the headnotes:

"A mandamus issued by the Federal District Court for the purpose of satisfying a judgment previously entered therein against a county, and commanding tax officials to assess all property in the county at its full value and continue so doing until the judgment shall be paid, but laying down no further details as to the manner of making assessments, is to be taken as requiring that they be made in accordance with the laws of the State, leaving the question whether an assessment, when made, complies with those laws to be determined, in appropriate proceedings, by that court, or by the state courts.

"Hence, where, in purported compliance with such mandamus, the property in the county was assessed at full value for county taxes (out of which the federal court judgment was to be paid) but at one-half its value for state, municipal and school taxes, and the State Supreme Court, adjudging that the discrepancy was contrary to a uniformity requirement of the State Constitution and not in accord with the direction of the Federal Court, refused to enforce collection of the county taxes for more than 50%—*held*, that the judgment of the state court plainly did not deny the authority or question the validity of the mandamus of the Federal Court, and was not reviewable in this Court under Sec. 237, Jud. Code, p. 176".

We think the principles announced in this case are applicable here.

[fol. 135] The object of a writ of mandamus or a mandatory injunction is merely to require public officials to perform an existing duty and courts cannot require them to do more than the law permits them to do. As was said in United States v. County of Macon, 99 U. S. 582, 591: "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights, or confer new powers. All we can do is to bring existing powers into operation". And even though the Federal Court properly rendered the judgment in favor of the certificate-holders against the appellee district and properly ordered the officials of the district to collect a tax upon the property of each citizen therein to pay the judgment, nevertheless this order did not deny to appellants and the individual tax-payer in that district the

right to set up any defense against the tax assessment that he might have.

Appellants in the instant case are not attempting to set up a class defense or one that is common to all the landowners in the district; they are asserting a defense, which is peculiar to themselves alone, based on the decrees of the state court which perpetually enjoined the district from collecting any more taxes on these lands. We hold that these decrees are res judicata, and we do not think it material in the present case whether these decrees of the state court were right or wrong, there being no allegation of fraud, or want of jurisdiction. No appeals were taken from them. The Supreme Court of the United States in Jeter v. Hewitt, 22 How. 352, said: "Res judicata renders white that which is black, and straight that which is crooked. Facit excurvo rectum, ex albo nigrum". The decrees in these suits rendered in 1931 and 1932, supra, could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals [fol. 136] were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record.

On the whole case we conclude, therefore, that the chancellor erred in holding that the lands of appellants are liable for any additional tax assessments in the appellee district, and its judgment is accordingly reversed with instructions to enter a judgment not inconsistent with this opinion.

Smith, McHaney and Baker, JJ., dissent.

[fol. 137] In Supreme Court of Arkansas

[Title omitted]

Petition for Rehearing—Filed June 14, 1939

The appellee respectfully prays the court to reconsider its decision in this case for the following reasons:

I

The Kersh Lake Drainage District, in 1912, was duly organized as an improvement district under our general drainage law, and made in that year an assessment of

benefits amounting to $293,191.90. By an Act of 1913, this assessment of benefits was made to bear interest at the rate of six per cent per annum. The District proceeded with its work of construction and issued to the contractors its negotiable certificates of indebtedness authorized by the statute to the amount of $181,500. Taxes were levied to meet these obligations by the Jefferson Circuit Court, where the affairs of the District were handled, varying in amount from time to time from three per cent to eight and one-half per cent of the assessed benefits, the last levy having been made by the court in 1924, when the amount of the levy was fixed at six and one-half per cent and was to continue until the last of said certificates of indebtedness should be paid. The District paid its indebtedness as it matured until 1929, when it made default in its payment of the principal. It continued to pay interest until August, 1932, when it made default thereon. Afterwards, the State Bank & Trust Company of Wellston, which owned $49,000 of the certificates of indebtedness, brought suit in the Federal Court and recovered a judgment for $54,655 on November 1, 1935. In that suit it was contended by the appellee that the certificates of indebtedness were void because with interest they would exceed the amount of the assessed [fol. 138] benefits, and that the statutes of 1913 and 1919, making the benefits bear interest, were not applicable to this District because passed after its organization and the making of the assessment. This defense, along with other defenses, was overruled and the action of the District Court was sustained on appeal to the Circuit Court of Appeals. Thereupon, the said State Bank & Trust Company of Wellston brought suit in the United States Court for a decree requiring the commissioners of the appellee District to act as receivers of the Federal Court. By its decree a mandatory injunction was issued, and they were required to act as receivers and to collect the drainage taxes. This suit was brought in pursuance of that mandatory injunction. Every question involved in this case was settled by those two cases. This Court, in refusing to recognize these decrees as res judicata of the questions now presented is denying to the decrees of the United States District Court for the Eastern District of Arkansas rendered in said cases, the faith and credit to which they are entitled, and is violating the rules of comity by which alone our dual

system of administering justice can be successfully operated.

II

In refusing to enforce the collection of the delinquent assessments as ordered by the mandatory injunction of the Federal Court, this Court has drawn into question the validity of an authority exercised under the laws of the United States, and has decided against the validity of the action of the District Court of the United States for the Western Division of the Eastern District of Arkansas, affirmed by the Circuit Court of Appeals of the Eighth Circuit.

III

By its decree in refusing to enforce the collection of the assessments of benefits to be collected by the decree of the United States District Court aforesaid this Court has re-
[fol. 139] fused to give effect to such judgment and mandatory injunction, in contravention of the judicial power granted to the Federal Courts by Article 3 of the Federal Constitution and Acts of Congress passed in pursuance thereto, and in contravention of clause 2 of Article 6 of the Federal Constitu-ion making the constitution and laws of the United States the supreme law of the land.

IV

By the decision of this Court in the case of Dickenson v. Mingea, 191 Ark. 946, and Act No. 46 of 1933, it has become the established law of this State that a Chancery Court can require the commissioners of an improvement district to act as its receivers. By the decree of the United States District Court for the Eastern District of Arkansas, which appears on page 84-B of the transcript, it was provided as follows:

"It is further considered, ordered and decreed that the defendants, T. H. Free, Claud H. Holthoff and Emmet Warren, as commissioners of said district, be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary as commissioners of said district to insure the prompt collection of the drainage

taxes; and the said commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes."

This suit was, therefore, brought by them as receivers of the United States Court and in refusing to affirm the opinion of the court below, this court has put itself in opposition to [fol. 140] the said court of the United States, and undertaken to prevent enforcement of the process of that Court.

V

The court assumes that the litigation between the District and its landowners is a thing with which its creditors have no concern. It treats the litigation just as if the District owed no debts which would be affected by its judgment.

The decision would be justified if the District were free of debt, and the only question was whether it would or could enforce its taxes so as to get the money to pay necessary maintenance and expenses of operation.

This District, however, is largely in debt. The judgments against it in the Federal Court exceed $60,000, and a mere trifle has been paid upon them. The only assets of the District are its assessment of benefits. By the terms of the statutes and repeated decisions of this court, the benefits bear interest at six per cent. Running from 1912 to the present time the interest doubles them at least. In the decree on which the appellant relies it was held that they bore no interest, and that the land-owners having paid an amount equal to the principal, the officers should be enjoined from collecting any further taxes. The decision of this court would deprive the holders of the indebtedness of the only means of enforcing payment, and take their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

VI

The complaint in the suit of Johnson v. Kersh Lake Drainage District, relied upon by the appellant as res judicata, shows upon its face that benefits to the appellant's lands were assessed in 1912 at $1600, and that he has paid

only $1628, leaving all interest except $28 unpaid. The decree recites the same facts. Tr. 6. Therefore, it shows that only $28 had been paid upon the interest which, at the time of the rendition of the decree, amounted to as much as [fol. 141] the principal. The decree therefore bears its death wound on its face. The complaint contains no allegations justifying its entry, and it is, therefore, not merely voidable, but void, and the attempt of this court to give it force would deprive the creditors of the District of their property without due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The same is true of the decree rendered in favor of the other property owners, who did not appear in the court below or appeal to this court, and who are therefore not before the court.

VII

The decree in favor of appellant was entered on October 19, 1931. The Commissioners of the District and the other landowners were not lawyers, and honestly believed that the decision in the case brought by said Johnson for injunction stated the law, and that they, therefore, had discharged their full obligation. Accordingly all the other property owners in the District, who had paid their drainage taxes, brought suit in the chancery court of Lincoln county for the purpose of enjoining the collection of the taxes upon their lands. These included the three commissioners of the District. Holthoff, the chairman of the Board, was much the largest planter in the District; Free, another member of the Board was a large landowner; and Warren, the third member, was a large landowner as a member of the firm of Grant & Warren; and they united with all the other landowners who had paid their taxes in the suit to enjoin the collection of further taxes. In the latter case the decree was entered on June 15, 1932, and the commissioners of the District, whose duty it was to protect its interest, were plaintiffs under the mistaken belief that they had the right to appear in that dual capacity. Counsel criticises them for occupying now a different position; but they are now acting as the receivers of the United States District Court under a mandatory injunction compelling them to bring suit to foreclose the taxes. The decree procured by the commis- [fol. 142] sioners as plaintiffs destroying the rights of the District to collect the taxes out of which alone its debts can

be paid, does not constitute due process of law within the provisions of the Fourteenth Amendment to the Constitution of the United States, and this Court in sustaining it as res judicata violates the requirement of due process secured to every person by said Amendment.

VIII

It has been settled by repeated decisions of the Supreme Court of the United States that the due process of law guaranteed to all litigants by the Fourteenth Amendment to the Constitution of the United States requires that every judgment or decree be based upon notice to the interested parties and an opportunity to be heard. This Court holds that the decrees in favor of Johnson and other owners of real estate of the District were binding upon the holders of the negotiable certificates of indebtedness, although they were not parties to the litigation and never heard of it till years after the rendition of the decrees. This suit is brought for their benefit and they are the real parties in interest. The decree herein would deprive them of all means of collecting their indebtedness if it were sustained, and is in plain violation of said Fourteenth Amendment, which provides that no person shall be deprived of his rights by a proceeding of which he had no notice and in which he had no opportunity to appear and defend.

IX

Negotiable paper passes from hand to hand in the markets of the world. Our whole system of transacting business would be destroyed if it were held that the holder of negotiable paper who brings suit upon it could be affected by any proceeding against a previous holder. It is therefore, the universal rule that the holders of negotiable paper are not affected by res judicata unless the paper is seized and impounded. These certificates of indebtedness are in a form set forth on page 30 of the transcript. They are pay-[fol. 143] able to Hahn and Carter, or bearer. In deciding that the holders of said certificates were bound by the decision of the Lincoln Circuit Court in the suits brought by Johnson and other landowners and of which they never heard until years after their rendition this court would deprive the holders of said certificates of their property without due process of law in defiance of the Fourteenth Amendment to the Constitution of the United States.

X

It has been held repeatedly by the Supreme Court of the United States that no State Court by any order, judgment, decree or process can interfere with the enforcement by the Courts of the United States of their judgments and decrees. The Court below did its duty in rendering a judgment of foreclosure in accordance with the mandatory injunction issued against the Commissioners of the District and the taxing officers of the counties by the United States District Court for the Western Division of the Eastern District of Arkansas; and this Court, in setting aside that decree, has undertaken to defeat the operation of the decrees of the said United States Court.

XI

The decision in the case undertakes to nullify the action of the United States District Court in the two cases brought against said District by the State Bank & Trust Company of Wellston and denies to it and to the other holders of the certificates of indebtedness that protection of the law to which they are entitled by said Fourteenth Amendment.

XII

It may be true that there is a considerable amount of drainage taxes which have not been collected; but substantially all such drainage taxes are upon unimproved lands, which are not worth the amount of the assessment, and which could not be sold for any price with the drainage as- [fol. 144] sessment upon them; so that they are absolutely worthless as security for the debts of the District. All the lands of any value have by this decision been freed from liability for the debts of the District.

XIII

This decision not only affects the obligations of this District, but it also affects all other bonds issued by improvement districts in the State of Arkansas. Such bonds are held by parties scattered all over the United States and some in foreign countries. Any district, which wishes to repudiate its debt, need only have a suit brought by its landowners against the commissioners, of which the bondholders would hear nothing, and let a decree be entered therein, enjoining the further collection of taxes.

XIV

There is a mistake of fact in the opinion which should be corrected lest it cause trouble in the future. In the first paragraph of the opinion it is stated that the amount of benefits is $272,782.12. In point of fact, as appears on page 18 of the transcript, the amount of the assessment of benefits was $293,191.90. The $272,782.12 was the amount of the original estimated cost of the work plus interest upon the certificates of indebtedness, which the District was proposing to issue. This mistake is not material to this appeal, but such errors are dangerous and may mislead in future litigation.

The appellee, therefore, prays that the decree of reversal heretofore entered in this cause be set aside and a decree of affirmance be entered; and that they be given two weeks from next Monday in which to prepare and file a printed brief in support of this petition.

Respectfully submitted, E. W. Brockman, Rose, Loughborough, Dobyns & House, for Appellee.

[fol. 145] State of Arkansas,
County of Pulaski:

I, George B. Rose, one of the attorneys for the appellee, hereby certify that in my judgment the positions taken in the foregoing petition for reconsideration correctly state the law, and that this petition is not filed for purposes of delay.

G. B. Rose.

[File endorsement omitted.]

[fol. 146] In Supreme Court of Arkansas

Order Overruling Petition for Rehearing—October 2, 1939

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz;

. . . . . .

No. 5501

Arthur Johnson

v.

Kersh Lake Drainage District.

. . . . . .

[fol. 147] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR STAY OF MANDATE—Filed Nov. 1, 1939

The appellee respectfully shows to the Court that it contemplates applying to the Supreme Court of the United States for a certiorari to review the judgment in this Court in this case, and it tenders herewith a bond executed by a Surety Company, authorized to do business in the State of Arkansas, conditioned as the law requires, and asks that the mandate in this cause be held up until the final action of the Supreme Court of the United States on the petition for Certiorari.

Kersh Lake Drainage District, by G. B. Rose, Attorney.

[File endorsement omitted.]

[fol. 148] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—Filed November 1, 1939

Now on this day is presented to the undersigned Justice of the Supreme Court of the State of Arkansas a petition setting forth that the said appellee contemplates applying to the Supreme Court of the United States for a writ of certiorari to review the judgment rendered in this cause by this Court, and the said bond is approved, and an order made that the issuing of the mandate herein be stayed until the Supreme Court of the United States has acted upon said petition.

Griffin Smith, Chief Justice Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 149] Bond on petition for certiorari for $500.00 approved and filed Nov. 1, 1939, omitted in printing.

[fol. 150] IN SUPREME COURT OF ARKANSAS

JOHNSON

v.

KERSH LAKE DRAINAGE DISTRICT

DISSENTING OPINION—November 17, 1939

SMITH, J. (dissenting)

The majority opinion discovers a new method whereby old debts may be discharged without payment, even in cases where there is no question of limitations in favor of the debtor, or imputation of laches against the creditor. I, therefore, dissent.

I think it unimportant whether there was collusion in the rendition of the decree which is pleaded as res adjudicata. It sufficies to say that the majority opinion opens wide the door for such collusion and affords easy opportunity to defeat the collection of substantial parts of an improvement district's obligations.

Of the innumerable improvement districts, of various kinds, which have been organized throughout the state it is doubtful whether in any instance the property owners were required to discharge the betterments assessed against their lands in a single payment. Certainly the rule is to distribute these payments of betterments over a period of years, and when this is done numerous cases have held that interest may be charged upon these betterments. These cases are all to the effect that the interest charge does not operate to increase the betterments, but is a charge made for the indulgence of extension of time in paying the betterments. Among other cases so holding are the following: Oliver v. Whittaker, 122 Ark. 291, 183 S. W. 201; Pfeifer v. Bertig, 141 Ark. 531, 217 S. W. 791; Skillern v. White River Levee District, 139 Ark. 4, 212 S. W. 90; Massey v. Ark. & Mo. Highway District, 163 Ark. 63, 259 S. W. 387; Griffin v. Little Red River Levee District, 157 Ark. 590, 249 S. W. 16; Faulkner Drainage District v. Williams, 169 Ark. 592, 276 S. W. 604; Chicago Mill & Lbr. Co. v. Drainage District No. 17, 172 Ark. 1059, 291 S. W. 810.

[fol. 151] Act 467 of the General Acts of 1919 (page 343) provides that "Where assessments of benefits have been

made in drainage districts organized either under general or special acts, the property owner shall have the right to pay such assessments in full within sixty days after the passage of this act, but if he does not avail himself of this privilege, the assessment of benefits shall bear interest at the rate of six (6%) per cent per annum, and shall be payable only in installments as levied. The interest need not be computed until necessary to be sure that the collections have not exceeded the total amount of benefits and interest; or the interest may be first collected."

The circumstance that the statute making the benefits bear interest was passed after the district was organized and the benefits assessed, is not of controlling importance. The decisions of the United States Circuit Court of Appeals of this Circuit in the cases cited in the majority opinion involved the very taxes here sought to be collected.

That the statute above quoted is applicable to the instant case very clearly appears from the opinion of this court in the case of Benton v. Nowlin, 187 Ark. 738, 62 S. W. 2d 16. The theory upon which interest may be collected on deferred payments of installments of betterments was so thoroughly considered by the late Justice Butler in the case just cited that it would be a work of supererogation to pursue the question further.

Most—if not all—of the improvements constructed in this state, under our various improvement district statutes, have been paid for by the issuance of certificates of indebtedness or of bonds, the maturities of which are so distributed that they may be paid with the annual collection of installments of betterments.

Now, it may or may not be necessary to collect interest [fol. 152] on these betterments; but the right to do so is unquestioned. The collection of this interest may be required to pay the district's obligations; but the majority opinion permits that right to be defeated. It is only required that the commissioners permit themselves to be sued, and for the showing to be made that property owners have paid their original assessments without paying the interest thereon. The commissioners of the districts, who are usually large property owners, are under the temptation to make no defense, as they profit along with other property owners, in being relieved of proportionate liability for interest, and this relief may be awarded under

the majority opinion, although the real parties in interest, the holders of the bonds, or the certificates of indebtedness of the district, may be in profound ignorance of the suit until the right of appeal has been lost. This is the effect of the majority opinion, and I am constrained to dissent, and am authorized to say that Justices McHaney and Baker concur in the views here expressed.

[fol. 153] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 154] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD—Filed November 29, 1939

It is agreed that in the printing of the record herein the following matters shall be omitted:

All the matter appearing on pages 28 to 64, inclusive, and pages 74 to 76, inclusive; on pages 83 and 84, and on pages 86 to 116, inclusive, of the typewritten transcript sent up by the Clerk of the Supreme Court of the State of Arkansas.

George B. Rose, Attorney for Petitioner. Walter G. Riddick, Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 29, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

DEC 16 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 595

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS, ET AL.,

Petitioners,

vs.

A. J. JOHNSON

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF

GEORGE B. ROSE
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 595

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS, AND T. H. FREE, CLAUDE H. HOLTHOFF AND EMMETT WARREN, AS COMMISSIONERS OF SAID DISTRICT,

Petitioners,

vs.

A. J. JOHNSON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties, Arkansas, is an improvement district organized under the laws of the State of Arkansas, and T. H. Free, Claude H. Holthoff and Emmett Warren are its Commissioners, and they pray this Court for the issuance of a writ of certiorari to the Supreme Court of the State of Arkansas, which is the court of last resort

in that State, to review a final judgment of said court reversing a decree of the Chancery Court of Lincoln County. Said suit was brought by order of the United States District Court for the Eastern District of Arkansas in its Western Division, commanding the petitioning Commissioners of said District to act as its receivers in effect, as authorized by the statute and decisions of said Supreme Court, and to bring suit to collect assessments of benefits upon lands within the District, which stood delinquent for drainage taxes. The Lincoln Chancery Court rendered a decree in accordance with the decree of the United States District Court, and the said Johnson, the only one of said landowners who appeared to contest the levy of the assessment, but who was defending for himself and all other landowners, carried said case to the Supreme Court of Arkansas where a decree was rendered reversing the decree of the Chancery Court of Lincoln County upon grounds inconsistent with the decree of the United States District Court, and which, if sustained, will prevent the collection of the amount adjudged by said District Court of the United States to be due the plaintiff therein, and the amount due Lillian Iddings, intervener in said case.

Your petitioners respectfully show that the decision of the Supreme Court of Arkansas is probably not in accord with the applicable decisions of this Court for the reasons hereinafter stated, and fully set forth in the petition for rehearing.

Statement of Basis of Jurisdiction

The jurisdiction of this Court is invoked under Act of Congress of February 13, 1925, Chapter 229, 43 Statutes 936, Sec. 237B of the Judicial Code, 28 U. S. C., Sec. 344(b), regulating the issue of writs of certiorari to bring up for review judgments of State courts of last resort.

Date of Judgment

The judgment of the Supreme Court of Arkansas, which is probably not in accord with the applicable decisions of this Court, was rendered on May 29, 1939. The opinion of the court is not yet officially reported, but may be found in 131 S. W. (2d) 620. Within the time allowed by law petitioners filed their petition for rehearing, asking that the decision be reconsidered, but on October 2, 1939, the petition was denied.

Federal Questions Presented

1. Can a State court enjoin the collection of a tax authorized by State law and ordered by a United States court to be collected for the purpose of raising money to pay a judgment rendered by it?

2. Can a State court deny all faith and credit to a judgment of a Federal court brought to its attention by proper pleading and duly certified as the law requires?

3. Can the holders of a judgment against an improvement district, rendered by a Federal court, be deprived of the means of collecting their judgment by an injunction against the collection of the improvement taxes, issued in a suit brought by a landowner of the district against the district and its commissioners in which these are the only parties, and where no notice was given to creditors and they were given no opportunity to be heard? Or would the injunction decree be void as to creditors because it would deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

The Court may wish to see how these questions arose, and we restate them more in detail as follows:

(1A) When a United States District Court had rendered a money judgment against an improvement district in 1935,

and in 1936 had adjudged that the assessment of benefits of the district bears interest at 6% per annum, and had decreed that the commissioners of the district act as its receivers in effect, all in accordance with State statutes and repeated decisions of the State Supreme Court, and has commanded the commissioners to bring suit to collect the delinquent taxes levied by the proper State court to pay the debts of the district, which taxes can be collected only by a suit to foreclose the lien thereof, and the decree of the District Court has been affirmed by the Circuit Court of Appeals, and suit to foreclose the improvement tax lien has been brought by the commissioners acting as receivers in effect of the District Court, can such suit be defeated by a plea of *res judicata* based on decrees rendered in 1931 and 1932 by a State court in two suits brought by landowners against only the district in one case and against only the district and its commissioners in the other, to which no creditor was a party and no notice to creditors is shown?

The decree exhibited with the plea of *res judicata* shows that the defendant commissioners were the largest landowners in the district and were the greatest beneficiaries of the decree, which forever enjoins them as commissioners from proceeding to collect further taxes amounting to $29,789.46 on their own lands because they have paid taxes to the amount of their assessed benefits without interest. They took no appeal from the decree, though it would certainly have been reversed. Will the fact that the decree was plainly collusive affect the result?

(2A) When suit was brought to foreclose the lien of the improvement taxes as above set forth, and a plea of *res judicata* was filed on behalf of the landowners, setting up said decrees of 1931 and 1932, the commissioners, acting as receivers in effect of the District Court, amended their

complaint, pleading the decree of the District Court affirmed by the Circuit Court of Appeals, as *res judicata*. The State Chancery Court accepted this as controlling, and rendered a decree foreclosing the lien of the delinquent improvement taxes. On appeal the Supreme Court of Arkansas rendered a decree sustaining the defendants' plea of *res judicata*, and forever enjoining the collection of further improvement taxes on the lands released by those decrees. In so doing did it give due faith and credit to the decree of the United States District Court?

(3A) When the Supreme Court of Arkansas entered its decree as above set forth, which, if effective, will deprive the holders of the judgments in the Federal court, who are the real parties in interest in this case, of all means of collecting their judgments, did its decree deprive the holders of the Federal court judgments of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

It will be seen that this is not a mere private wrong. The judgments of two Federal courts have been denied all faith and credit by the Supreme Court of Arkansas, and only this Court can vindicate the majesty of National Justice.

Authorities Believed to Sustain the Jurisdiction

It is believed that the following are some of the cases that sustain the jurisdiction of this Court:

(1 and 1A) No action by a State court will be allowed to interfere with the enforcement of a judgment of the Federal court. *Riggs* v. *Johnson County*, 6 Wall. 166; *U. S.* v. *Keokuk County*, 6 Wall. 514; *Supervisors* v. *Durant*, 9 Wall. 115; *Mayor* v. *Lord*, 9 Wall. 409; *Hawley* v. *Fairbanks*, 108 U. S. 544; *Gaines* v. *Springer*, 46 Ark. 502.

(2 and 2A) State courts must give full faith, credit, and effect to the judgment of the Federal courts. Art. IV, Sec. 1, paragraph 2 of Art. VI of the Constitution of the United States, Section 905 of Revised Statutes; *Chandler, Receiver,* v. *Peketz,* 297 U. S. 609; *Stoll* v. *Gottlieb,* 305 U. S. 165; *Knights of Pythias* v. *Meyer,* 265 U. S. 30-33; *Hancock National Bank* v. *Farnum,* 176 U. S. 640; *Metcalf* v. *Watertown,* 153 U. S. 671; *Dupasseur* v. *Rochereau,* 21 Wall. 130, 134; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.,* 120 U. S. 141, 146; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Long Island Loan & Trust Co.,* 172 U. S. 493, 507; *Des Moines Navigation & Railroad Co.* v. *Iowa Homestead Company,* 123 U. S. 552, 559; *Embry* v. *Palmer,* 107 U. S. 3, 10; *Wolff* v. *New Orleans,* 103 U. S. 358.

(3 and 3A) Notice and an opportunity to be heard are the essence of due process of law under the Fourteenth Amendment; and without due process of law no man can be deprived of his property. *Windsor* v. *McVeigh,* 93 U. S. 274; *Hagar* v. *Reclamation Dist. No. 108,* 111 U. S. 701; *Ochoa* v. *Hernandez,* 230 U. S. 139; *Scott* v. *McNeal,* 154 U. S. 34; *Hall* v. *Finch,* 104 U. S. 261; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 39; *Empire* v. *Darlington,* 101 U. S. 88; *Brooklyn* v. *Insurance Co.,* 99 U. S. 362.

Summary Statement of the Facts

This district was duly organized by the Jefferson Circuit Court in August, 1912, under the general drainage law of Arkansas (Acts of 1909, p. 829). The material parts of this and all other statutes referred to herein are in the appendix. Its benefits were assessed at $293,600.

On March 13, 1913, the statute was amended to make the benefits bear interest at 6% per annum (Ark. Acts 1913, p. 752; Pope's Dig., Sec. 4494). On March 28, 1919, a

statute was passed making the benefits of all drainage districts, whether created by special acts or organized under the general law, bear interest at the same rate (Ark. Gen. Acts of 1919, p. 343; Pope's Dig., Sec. 4507).

The statute authorizes such districts to issue to the contractors who do the work negotiable evidences of indebtedness. The district let the contract, and as the work progressed issued negotiable certificates of indebtedness to the amount of $185,500, payable serially through the years until August 1, 1934. These were paid as they matured until August 1, 1929, when the district defaulted.

In 1913 a drainage tax of 3% of the benefits was levied by the Jefferson Circuit Court. As the certificates of indebtedness were issued higher taxes were levied. Finally in 1924 the court levied a drainage tax of 6½% to continue until the last of the certificates of indebtedness were paid. (See findings in decree of U. S. Dist. Court, R. 20.)

The State Bank & Trust Company of Wellston, Missouri (hereinafter called the Bank), which held a number of the defaulted certificates of indebtedness, brought suit upon them in the United States District Court for the Western Division of the Eastern District of Arkansas. The case was transferred to equity, and on November 1, 1935, the Bank was awarded a judgment for $54,655.00, with interest thereon at 6% (R. 21). This case was carried by the Drainage District to the Circuit Court of Appeals, where the decree was affirmed, 85 F. (2d) 643 (R. 36-37).

Under the law of Arkansas, when an improvement district has made default for 30 days in the payment of any debt, any creditor may, by mandatory injunction, compel its commissioners to act as receivers of the court (Act 46 of 1933; *Dickinson* v. *Mingea*, 191 Ark. 34, 39). The Bank brought suit in the same court for this purpose. The District defended on the ground that the statutes making the

benefits bear interest were passed after the District was organized and the benefits assessed, and for that reason were inapplicable to this District. The District further alleged in its answer that the property owners which had paid the entire value of assessed benefits against their lands had obtained a decree in the Lincoln Chancery Court in the case of *W. A. Fish et al.* v. *Kersh Lake Drainage District* on June 15, 1932, enjoining and restraining the Commissioners of the District from levying or extending any tax against these lands, the assessed benefits of which had been fully paid. Pursuing this same contention, the District, in its requested declarations of law, asked the court to declare that under no circumstances should the Bank have a mandatory injunction against the District and its Commissioners except to have taxes levied and extended against the unpaid assessments of benefits against those lands wherein the assessments of benefits had not been fully paid (R. 32).

The Supreme Court of Arkansas had repeatedly decided that the statutes making the benefits bear interest were valid. In three of these cases the statute was passed after the bonds were sold and the work begun or finished. Having before it this plea, and also the plea that the Commissioners of the District had been restrained from collecting further assessments against the lands involved in the Fish case, together with the District's requested declaration of law that the mandatory decree shall not apply to lands against which the assessments of benefits had been fully paid, the District Court rendered a decree on December 22, 1936, that the benefits bear interest at 6% from the date of their confirmation in 1913. This decree directed that the county clerks in the various counties in which the District lies, who were made defendants, extend upon the tax books of their respective counties a tax of 6½% of the benefits assessed against each tract of land in the District for each

of the years 1936 and the following years until the whole of the decree should be satisfied (R. 21). The decree further provided that the commissioners should act as receivers of the court, and as such bring suit to collect all delinquent taxes of the District, which are collectible only in this way (R. 21-22).

Mrs. Lillian Iddings, who had intervened as the holder of some of the certificates of indebtedness, and obtained judgment, was made a beneficiary of the decree (R. 21). (Although the record shows that the judgment in favor of Mrs. Iddings was in the amount of $3,222.24, this was in fact a clerical error, which was later corrected. The final judgment in her favor as actually entered by the Federal court, which does not appear in this record, was admittedly in the amount of $7,616.40.)

The District appealed this case to the Circuit Court of Appeals, where the decree was affirmed. *Kersh Lake Drainage District* v. *State Bank & Trust Company of Wellston*, 92 F. (2d) 783 (R. 37).

The Commissioners, in obedience to the order of the District Court, brought suit in the Lincoln Chancery Court for the foreclosure of the delinquent assessments (R. 1). All the landowners made default except A. J. Johnson. He filed an answer in behalf of himself and all other landowners similarly situated (R. 3).

In this answer he alleged that his land was assessed at $1,600, and that he had paid $1,628. As the benefits had borne interest at 6% from 1913 to 1937, the assessment had been at least doubled.

He also filed a copy of a decree rendered October 19, 1931, by the Lincoln Chancery Court in an injunction suit brought by him aaginst the District (R. 6), where the court found that his assessment of $1,600 was discharged by the

payment of $1,628, and he pleaded this as *res judicata* (R. 3).

He likewise filed a copy of a decree of the same court rendered in an injunction suit brought by two persons named Fish against the District in 1932 (R. 8). This decree shows that upon the filing of the suit an auditor was appointed by the court to ascertain what drainage taxes had been paid on each tract of land; and the decree enjoined the collection of all drainage taxes on lands whose owners had paid an amount equal to the original assessment without interest. The amount released by this decree was $197,630.00.

The only defendant in the Johnson suit was the District. The only defendants in the Fish suit were the District and its Commissioners. The only plaintiff in the Johnson case was Johnson himself. The only plaintiffs in the Fish suit were the two Fishes. The number of landowners whose assessments were satisfied was 102. Amongst these were the three Commissioners, who were relieved of drainage assessments amounting to $29,789.46, as follows: Holthoff, Chairman of the Board, $15,283.12; Free, $7,577.50; Gantt & Warren, $6,928.84. Warren was the third Commissioner.

Though these decrees would certainly have been set aside by the Supreme Court of Arkansas because they allowed nothing for interest, as required by its repeated decisions, no appeal was taken by the Commissioners, though it was their duty to do so as trustees for the District and its creditors. Their present change of attitude is explained by the fact that they are now acting as receivers of the Federal court.

When this answer was filed, the District filed an amendment to the complaint in its suit to foreclose drainage taxes, setting up the decrees in the District Court as *res judicata*, and filing with it certified copies of the decrees with the

pleadings in both cases (R. 24). In its amended complaint, the District raised the Federal questions now relied upon by it for reversal of the judgment of the Supreme Court of Arkansas.

The chancellor entered a decree overruling the defenses and foreclosing all the delinquent assessments (R. 41).

Johnson appealed to the Supreme Court of Arkansas. In their brief in that case the petitioners again insisted upon and argued the Federal questions now presented to this Court. On May 29, 1939, the Supreme Court of Arkansas, by a four to three decision, reversed the decree of the trial court, holding that the decrees rendered in 1931 and 1932 in the injunction suits brought by Johnson and Fish were *res judicata*, precluding the collection of any further drainage taxes on the lands therein described (R. 47).

The petitioners, in apt time, filed a petition for rehearing (R. 56), in which the Federal questions now relied upon were again brought to the attention of the Supreme Court of Arkansas. This petition was overruled on October 2, 1939 (R. 63).

The Supreme Court of Arkansas is the last court of that State to which the case could be carried.

The only evidence as to the amount of benefits yet to be collected is the statement of Victor Felly, witness for respondent, who gives the amount as $52,119.40 (R. 41). The judgment of the Bank is $54,654 with interest at 6% from November 1, 1935, and that of Mrs. Iddings is $7,616.40 with like interest from December 26, 1936. It is, therefore, evident that if all the assessments were paid, which is incredible, the benefits without interest would lack many thousands of dollars of sufficing to pay the judgments of the Federal court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal

of this Court, directed to the Supreme Court of Arkansas, commanding the said court to certify and send to this Court, a full and complete transcript of the record and all proceedings of said Supreme Court of Arkansas in the said case, entitled Johnson *et al. v.* Kersh Lake Drainage District, No. 5501, to the end that the said case may be reviewed and determined by this Court as provided by Section 237B of the Judicial Code, and that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that the said judgment of the said Supreme Court of Arkansas in the said case and every part thereof may be reversed by this Honorable Court.

KERSH LAKE DRAINAGE DISTRICT OF LINCOLN, JEFFERSON & DESHA COUNTIES, ARKANSAS, and T. H. FREE, CLAUDE H. HOLTHOFF and EMMETT WARREN, Its Commissioners,
Petitioners,

By GEORGE B. ROSE,
Their Attorney.

STATE OF ARKANSAS,
County of Pulaski:

I certify that this petition for certiorari is not taken for purposes of delay; but that justice may be done, and that I believe the positions assumed in the petition and in the brief are in accordance with the law.

GEORGE B. ROSE,
Atty. for Petitioners.

APPENDIX

Applicable Arkansas Statutes

Pope's Digest

Sec. 4484. *Bonds secured by liens—enforcement.* All bonds issued by commissioners under the terms of this act shall be secured by a lien on all lands, railroads and tramroads in the district, and the board of directors shall see to it that a tax is levied annually, and collected under the provisions of this bill, so long as it may be necessary to pay any bond issued or obligation contracted under its authority; and the making of said assessment or levy and collection may be enforced by mandamus.

If any bond or interest coupon on any bond issued by said board is not paid within thirty days after its maturity, it shall be the duty of the chancery court of the proper county, on the application of any holder of such bond or interest coupon so overdue, to appoint a receiver to collect the taxes aforesaid; and the proceeds of such taxes and collections shall be applied, after payment of costs, first to overdue interest, and then to payment pro rata of all bonds issued by the said board which are then due and payable; and the said receiver may be directed by suit to foreclose the lien of said taxes on said lands; and the suits, so brought by the receiver, shall be conducted in all matters as suits by the board, as hereinbefore provided, and with like effect; and the decrees and deeds herein shall have the same presumptions in their favor; provided, however, that when all such sums have been paid, the receiver shall be discharged, and the affairs of the district conducted by the board of directors of said district as hereinbefore provided. (General Drainage Act of 1909, Sec. 25.)

Sec. 4494. *Interest included in tax—mode of payment of assessment.* The amount of interest which will accrue on bonds issued by such districts and subdistricts shall be included and added to the tax, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the cost of construction in determining whether

or not the expenses and costs of making said improvements are or are not equal to or in excess of the benefits assessed.

When assessments of benefits are made in drainage and other improvement districts, the landowners shall have the privilege of paying the same in full within thirty days after the assessment becomes final. But all such assessments shall be made payable in installments (a), so that not more than twenty-five per cent shall be collectible in any one year against the wishes of the landowner, and, in the event that any landowner avails himself of this indulgence, *the deferred installments of the assessed benefits shall bear interest at the rate of six per cent per annum, and shall be payable only in installments as levied. The levy of the assessment may be made by way of proportional amounts of the total assessed benefits, and interest need not be calculated until it is necessary to do so to avoid exceeding the total amount of benefits and interest.* (Italics ours.) (Act 177 of 1913, Sec. 10, page 746.)

ACT 467 OF 1919

General Acts of 1919, page 343

An Act Permitting Deferred Payments of Assessments in Drainage Districts.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Where assessments of benefits have been made in drainage districts organized either under general or special acts, the property owner shall have the right to pay such assessments in full within sixty days after the passage of this Act, but if he does not avail himself of this privilege, *the assessment of benefits shall bear interest at the rate of six (6%) per cent per annum,* and shall be payable only in installments as levied. The interest need not be computed until necessary to be sure that the collections have not exceeded the total amount of benefits and interest; or the interest may be first collected. (Italics ours.)

Approved March 28, 1919.

ACT 46 OF 1933

Page 126

An Act to Regulate the Collection of Improvement District Taxes

Whereas, abuses are prevalent in receiverships of levee, drainage and road districts, in the allowance of excessive fees to counsel for filing suits for receivers, the allowance of excessive fees to receivers, the appointment of unnecessary attorneys for receivers and the allowance of excessive fees to them, all of which imposes an additional financial burden on the landowners of the district, and

Whereas, the collection officers provided by law can collect improvement district taxes more expeditiously and at less expense than receivers, if they are made to discharge their duties; now, therefore,

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by a mandamus, or by a mandatory injunction in equity, at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes.

Approved February 18, 1933.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 595

KERSH LAKE DRAINAGE DISTRICT ET AL.,
Petitioners,

vs.

A. J. JOHNSON.

BRIEF FOR PETITIONERS

State Courts Will Not be Permitted to Prevent the Enforcement of the Judgments of the Federal Courts

It is established by the decisions of this Court that the Federal Courts will not permit any judgment or act of any State Court to stand in the way of the enforcement of the judgment of the Federal Court. The question has mostly arisen in cases like this where judgments have been rendered by the Federal Court against political bodies of a State requiring them to levy a tax to pay a judgment of the Federal Court and where the defendants pleaded a decree of a State Court enjoining the collection of the tax.

The leading case on the subject is that of *The Supervisors* v. *Durant*, 9 Wall. 415. There a county had issued bonds in aid of certain railroads, and the electors had

voted to levy an annual tax to pay the interest. Some of the bonds were purchased by Durant. In 1860 certain taxpayers of the county filed a bill in the State Court to enjoin the levying of any taxes to pay either principal or interest of the bonds. Durant appeared in the case and opposed the injunction, but the State Court found in favor of the plaintiffs and enjoined The Supervisors. Thereafter, Durant brought suit in the Federal Court and obtained judgment against the county on his bonds. Execution having been issued without satisfaction, the Federal Court granted a mandatory injunction against The Supervisors to levy the tax. The County appealed to this Court, contending that the injunction granted by the State Court in the earlier case prevented the levy of the tax. This Court upheld the judgment of the lower court, saying at pages 418 and 419:

> "In *Riggs* v. *Johnson County,* where it appeared that an injunction had been obtained in one of the State courts, upon the county commissioners, enjoining them against levying any tax to pay certain municipal bonds and coupons, a mandamus was nevertheless sustained to compel the levy of a tax, at the suit of one who had obtained judgment in the Circuit Court for some of the coupons. That case is full authority for the doctrine that an injunction of a State court cannot control, or in any manner affect the action, the process, or the proceeding of a Circuit Court, not because the latter has any paramount jurisdiction over State courts, but because the tribunals are independent of each other. It is true that in *Riggs* v. *Johnson County* it appeared the relator in the information, or suggestion for the mandamus, was not a party to the injunction suit, while the relator here was a party defendant. That, however, can make no difference. The present relator, though made a party with the other defendants, was not enjoined. The decree upon the bill for an injunction was exclusively against the board

of supervisors of Washington, at the suit of others than the relator. And had he been enjoined, it is not easy to see how that fact could have limited the power of the Circuit Court.

"It is of course immaterial whether the injunction of the District Court of Washington County was before or after the judgment obtained by the relator in the Circuit Court of the United States, or whether before or after the institution of the suit. It is not a question which court first obtained possession of the case. In the case of *The Mayor* v. *Lord*, the facts were that the plaintiffs in error had been enjoined against levying a tax, before suit was brought in the Circuit Court, yet it was held that the injunction was no sufficient answer to the alternative mandamus commanding them to levy a tax to pay the judgment afterwards recovered."

A similar situation was presented to the Court in the case of *Hawley* v. *Fairbanks*, 108 U. S. 543, where the Court said at page 551:

"The relator was not a party to the suit in which the injunction was obtained, and, consequently, is not bound by it. Having established her right to the tax by the judgment of the circuit court in a suit to which the town in its corporate capacity was a party, she may use the power of that court to command the assessment and collection of the tax as a means of carrying the judgment into execution, notwithstanding what the taxpayers may have caused to be done in some proceeding to which the relator was not a party. The right to the computation and assessment, as well as the collection of the tax, followed as a matter of law from the establishment of the liability of the town for the payment of the interest which it was agreed should be made by the assessment and collection of the tax. An injunction against the officers before the judgment against the town was rendered cannot stand in the way of the enforcement of the tax by the circuit court to carry its judgment into execution."

Several other decisions of this Court are in accord with the cases above cited. Among them are *Riggs* v. *Johnson*, 6 Wall. 166; *U. S.* v. *Keokuk County*, 6 Wall. 514; *Mayor* v. *Lord*, 9 Wall. 409. These cases have established the law to be that it makes no difference whether the decree of the State Court was rendered before or after the bringing of the suit in the Federal Court; nor does it make any difference whether the plaintiff in the suit in the Federal Court was made a defendant in the injunction suit in the State Court.

The Supreme Court of Arkansas Denies All Faith and Credit to the Judgment of the District Court of the United States, Though it Had Been Affirmed by the Circuit Court of Appeals

It is the established law in Arkansas that in a suit against an improvement district, it represents all of its landowners. In *Howard-Sevier Road Improvement District* v. *Hunt*, 166 Ark. 62, the Supreme Court of Arkansas says:

> "The judgment of the District Court of the United States, Western District of Arkansas, in which the Guardian Savings & Trust Co., as trustee for bondholders, instituted an action against the district and its commissioners, and in which the plaintiff sought to validate and collect the first installment on mortgage bonds of the district in the sum of $380,000, was likewise *res judicata* for the appellees' contentions in the case in hand. *The district, in that case, represented the taxpayers, and they were bound by the judgment of the Federal Court.* (Citing cases.)
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> . . . . . .
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> "The judgment of the United States District Court, after setting out the bonds, recited: They are 'the valid obligations of said district, and are each duly secured by a first mortgage on the assessment of benefits of

said district, bearing even date to the bond issue, and duly recorded.' The judgment in that case was duly pleaded and in evidence in these consolidated causes. It was the duty of the trial court to give full faith and credit to this judgment. (Citing cases.)"

Neither the State Bank & Trust Company of Wellston nor any other party holding indebtedness of the District was a party to the suits to enjoin the payment of the drainage tax which were brought in the Chancery Court of Lincoln County, nor were they notified of its pendency.

Prior to the passage of Act 46 of 1933, it was provided by statute in Arkansas that if an improvement district was in default for thirty days in the payments of its bonds or interest thereon any bondholder could put the District in the hands of a receiver. The statute so providing appears in the appendix. On February 18, 1933, the Legislature passed Act No. 46 which is in the appendix, and the material part of which is as follows:

"Section 1. Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by a mandamus, *or by a mandatory injunction in equity,* at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes."

The remedy by the appointment of a receiver was probably the most effective means of securing the payment of

the debts of improvement districts that was ever devised. It took the management out of the hands of the commissioners, who must be landowners and who are usually, as in this case, the largest landowners, and who would have to pay their share of any debts of the District, and put its affairs in the hands of an independent receiver, who would prosecute vigorously the necessary suits to collect the improvement taxes. It is a fundamental rule, often announced by this Court, that when you take away from the creditors one remedy, you must give them another substantially as efficient.

With this in mind, the Supreme Court of Arkansas, when the validity of an identical Statute came before it in the case of *Dickinson* v. *Mingea*, 191 Ark. 946, held that under its provisions the commissioners would be in effect the receivers of the court, saying:

> "There appears in the preamble to each of these acts the following paragraph: 'Whereas the collection officers provided by law can collect improvement district taxes more expeditiously and at less expense than receivers, if they are made to discharge their duties.' The significance of the phrase 'if they (the commissioners of the district) are made to discharge their duties' is not to be overlooked. The verb 'made' as here employed means to require or compel. But how are the commissioners to be 'made' to discharge their duties? Section 1, above quoted, answers 'by mandamus or by a mandatory injunction in equity.' There is therefore no abridgment of the court's jurisdiction. *The commissioners become receivers in effect in that they become subject to the jurisdiction of the court. The commissioners would thereafter report to and be supervised by the court just as a receiver would be to the end that they were 'made' to discharge duties imposed upon them by law.* The receivers could do no more than to follow and be governed by the law."

That language was quoted with approval in the same court in *Rogers Paving Imp. Dist.* v. *Swafford*, 193 Ark. 260.

In pursuance to these decisions the United States District Court, in the case of *State Bank & Trust Co. of Wellston* v. *Kersh Lake Drainage District*, included in its decree the following provisions:

> "It Is Further Considered, Ordered and Decreed that the defendants, T. H. Free, Claude H. Holthoff and Emmett Warren, as Commissioners of said district, be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary as commissioners of said district to insure the prompt collection of the drainage taxes; *and the said Commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes.*"

From the decree in that case, making the commissioners of the District its receivers, and levying on the land a tax of 6½ per cent of the benefits per annum until its judgments were paid in full, the defendant appealed to the Circuit Court of Appeals for the Eighth Circuit, which, in the case of *Kersh Lake Dr. Dist.* v. *State Bank & Trust Company of Wellston*, 92 F. (2d) 783, affirmed the action of the District Court (R. 37).

The suit, in which the judgment now sought to be reviewed was rendered, was brought in pursuance to the mandatory requirement of that decree, and was brought by the commissioners in their capacity as practically receivers of

the Federal court. When the respondent filed his answer, setting up the decrees of the Lincoln Chancery Court rendered in 1931 and 1932 as *res judicata*, the District amended its complaint and pleaded the decree of the Federal court, rendered in 1936, and affirmed by the Circuit Court of Appeals in *Kersh Lake Drainage District* v. *State Bank & Trust Company of Wellston*, 92 F. (2d) 783, as *res judicata*, and filed certified copies of the decree in that case and of the pleadings on which it was based.

The Chancery Court gave full faith and credit to the decree of the United States District Court, and rendered its decree foreclosing the lien for the delinquent taxes on land on which the owners had paid drainage taxes to the amount of the original assessment without interest. The Supreme Court of Arkansas, however, reversed the case, holding that the decrees of 1931 and 1932, enjoining the collection of further taxes upon such lands, were *res judicata*, barring the prosecution of the suit.

This Court has decided many times that the State courts must give full faith and credit to the decisions of the Federal Court. Art. IV, Sec. 1 and paragraph 2 of Art. VI of the Constitution of the United States, Rev. Stat. 905; *Stoll* v. *Gottlieb*, 305 U. S. 165; *Knights of Pythias* v. *Meyer*, 265 U. S. 30-33; *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 645; *Metcalf* v. *Watertown*, 153 U. S. 671, 676; *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.*, 120 U. S. 141, 146; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507; *Des Moines Navigation & Railroad Co.* v. *Iowa Homestead Company*, 123 U. S. 552, 559; *Embry* v. *Palmer*, 107 U. S. 3, 10; *Wolff* v. *New Orleans*, 103 U. S. 358; *Hale* v. *Finch*, 104 U. S. 261; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 39; *Empire* v. *Darlington*, 101 U. S. 88; *Brooklyn* v. *Insurance Co.*, 99 U. S. 362.

In the case of *Howard-Sevier Road Improvement Dist.* v. *Hunt*, 177 Ark. 62, the court says on page 72:

> *"As the district represented the taxpayers, it was bound to plead for them any defense that could have been set up* which would have rendered the bonds invalid, and a good defense would have been that, for any reason whatsoever, there was no valid assessment of benefits. *The district could, and should, have pleaded such defense for the benefit of the taxpayers."*

Thus it is seen that the rule in Arkansas is that a District represents its taxpayers and must plead defenses for their benefit. In compliance with this principle, the Commissioners of the District, in the amendment to their answer in the Federal court pleaded that a decree of the Lincoln Chancery Court had enjoined them from collecting additional assessments upon the lands of property owners who had paid the full amount of their assessment without interest (R. 32, paragraph 7 of amendment to answer). The District emphasized this point by requesting the court to declare as a matter of law that its mandatory injunction should be limited to the collection of assessments upon lands wherein the full amount of the assessment of benefits without interest had not been paid (R. 32). Nevertheless, the Federal court required the county clerks to extend taxes against every tract of land in the District, and directed the Commissioners, as its receivers, to bring suit to collect all delinquent taxes (R. 21, 22).

The Federal court, therefore, necessarily decided that the plea of the District was not well taken and that its judgment shall be collected by making an assessment against the property which was involved in the *Johnson* and *Fish* cases. In fact, the Federal court decree expressly found that the assessment of benefits did bear interest, which finding, when considered with its order that taxes be assessed

against every tract of land in the District, amounted to an express rejection of the plea made by the District.

Since the District represented all property owners having land within its boundaries, the decree of the Federal court is as binding upon the respondent and those he represents in this case as if they had appeared personally and contested the right of the Federal court to disregard the injunction decrees entered by the Lincoln Chancery Court. Nevertheless, the Supreme Court of Arkansas has undertaken to give new life to the injunction decrees, which the Federal court has held not to be binding on these petitioners. Under the authorities heretofore cited, the Supreme Court of Arkansas has, therefore, denied full faith and credit to the decree of the District Court, even though that decree has been affirmed by the Eighth Circuit Court of Appeals.

The Supreme Court of Arkansas says that as the Federal Court directed the commissioners to bring suit, and the suit was brought in the State Court, this meant that the State Court was to have full discretion as to the judgment it would render. This contention is completely settled by the case of *Chandler, Receiver*, v. *Peketz*, 297 U. S. 609. In that case the Federal Court in Minnesota, in winding up the affairs of an insolvent corporation, levied an assessment of 100 per cent upon the capital stock as authorized by the Statutes of Minnesota, and the receiver appointed in the case was directed to bring suit against the stockholders to recover the amount. Peketz, one of the stockholders, lived in Colorado, and the suit was brought there. The trial court there held, like the Supreme Court of Arkansas, that as the suit was brought before it, the decision should be in accordance with its views, and it refused to render judgment as required by the decree of the Federal Court. In this it was affirmed by the Supreme Court of Colorado. This Court sent down its certiorari, brought the case up, reversed

it and sent it back to the Supreme Court of Colorado, with directions to render a judgment in accordance with that of the Federal Court in Minnesota.

The case of *Hancock National Bank* v. *Farnum*, 176 U. S. 640, is precisely like the last. In winding up a Kansas corporation, the Federal Court in that State levied an assessment against its stockholders, and suit was brought upon this in a State Court in Rhode Island against a stockholder residing there. The Rhode Island Courts held that the stockholder was not bound; but this Court reversed that decision and held that the Rhode Island courts were bound by the judgment of the Federal Court in Kansas and remanded the case with directions to enter judgment accordingly. A number of cases to the same effect are cited in the opinion.

The Decision of the Supreme Court of Arkansas Deprives the Holders of the Judgments in the United States Court of Their Property Without Due Process of Law.

The decrees in the Chancery Court of Lincoln County could not affect the claims of creditors of the District.

This Court has decided in many cases that the essence of due process of law is notice and the opportunity to be heard. *Windsor* v. *McVeigh*, 93 U. S. 274; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701; *Ochoa* v. *Hernandez*, 230 U. S. 139; *Scott* v. *McNeal*, 154 U. S. 34. The creditors in this case had neither. They were not made parties to the suit, and had no notice of its pendency. Yet the decision of the Supreme Court of Arkansas destroys their only means of collecting their debt because of a decree to which they were not parties and of which they had no notice.

The case of *Fish* v. *Kersh Lake Drainage District* which the Supreme Court held to be conclusive upon the creditors holding judgments in the Federal Court, was obviously collusive as a matter of law. The greatest beneficiaries were the Commissioners of the District, who were relieved of

assessments upon their lands amounting to $29,789.46. They were the defendants in the suit. They filed no answer and made no defense; yet the chancellor relieved them and all other landowners, who had paid an amount equal to their assessment of benefits without interest, of all further liability. The case should have been appealed to the Supreme Court, which had many times held that statutes providing for interest upon assessments of benefits were valid, and which would certainly have reversed the decision. Respondent contended that the benefits could not be made to bear interest by a statute passed after the assessment was made; but in *Benton* v. *Nowlen*, 187 Ark. 738, *Skillern* v. *White River Levee Dist.*, 139 Ark. 4, *Chicago Mill & Lumber Co.* v. *Drainage Dist. No. 17*, 172 Ark. 1059, the statutes were passed after bonds were sold and the work done in whole or in part.

A collusive decree binds no one. It is not the act of the court, but merely a fraud upon the court. *Calhoun* v. *Delhi & M. R. Co.*, 121 N. Y. 69; *Craig* v. *Town of Andes*, 93 N. Y. 405; *Andes* v. *Ely*, 158 U. S. 312; *Central Trust Co.* v. *Bridges*, 57 Fed. 753, decided by Chief Justice Taft when circuit judge; Martin v. Wilson, 120 Fed. 202, decided by the Circuit Court of Appeals of the Seventh Circuit; *Schulte* v. *Board of Commissioners*, 119 Okla. 261; *In Re Gypsy Oil Company*, 141 Okla. 291; *May* v. *Roberts*, 133 Oregon 643; *Wolff* v. *New Orleans*, 103 U. S. 358; *Hale* v. *Finch*, 104 U. S. 261; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 39, *Empire* v. *Darlington*, 101 U. S. 88; *Brooklyn* v. *Insurance Co.*, 99 U. S. 362.

The decree in the Federal Court rendered in 1936 was *res judicata*, and would have superseded the decrees in the State Court rendered in 1931 and 1932 even if they had been valid. In matters of *res judicata* it is always the last judgment which controls. *Horse Creek Coal Land Co.* v. *Alderson*, 266 Fed. 477, decided by the Circuit Court of Appeals

of the Fourth Circuit; *California Bank* v. *Traeger*, 215 Calif. 346; *Sipple* v. *Catron*, 205 Ky. 81; *South* v. *Back*, 108 S. W. 230; *Cummins* v. *Mullins*, 183 Ky. 666; *Re McNeil's Estate*, 155 Calif. 333.

Opinion of the Supreme Court of Arkansas

It appears that the opinion of the Supreme Court of Arkansas in this case was based on *United States* v. *County of Macon*, 99 U. S. 582, and *Arkansas, Ex Rel. Utley, Attorney General, for the Use of Craighead County* v. *St. Louis San Francisco Railway Company et al.*, 269 U. S. 172. The first case only holds that the Federal court had no authority by mandamus to compel the collection of a tax which the law did not authorize. Here the laws of Arkansas do authorize interest on the assessment of benefits, and the District Court had so held in the decree in which the mandatory injunction was issued. Moreover, the tax of 6½% per annum had been duly levied by the Jefferson Circuit Court, to run until the last of the certificates of indebtedness had been paid in full. In the second case, the court said:

> "The mandamus not having prescribed the particular methods of assessing the tax, the state court was left free to determine whether the assessment was made according to law, and in so doing it did not determine any matter which had been adjudicated by the District Court or refuse to give full effect to its judgment."

We can see nothing in that case which justifies the opinion of the Supreme Court of Arkansas in the present case. There the State court determined a matter that had not been adjudicated by the Federal court. Here there had been litigated in the Federal court the question of whether the assessed benefits bore interest at six per cent, and the Federal court had determined that they did; and the Supreme

Court of Arkansas failed to give the Federal court's decree full faith and effect.

We pray the Court to read the dissenting opinion filed by Justice Smith and concurred in by Justices McHaney and Baker, and which is interesting as showing the disastrous results that might follow an affirmance of the decision of the court below.

Benefits Insufficient If Decrees in Lincoln Chancery Court Are Permitted to Stand

In the court below counsel asserted that $100,000 of benefits remained unimpaired by the decrees in the Lincoln Chancery Court, but the statement (R. 41) of their own witness, Victor Felly, stands uncontradicted, and shows that the total uncollected benefits amount only to $52,119.40. The judgment recovered by the Bank is $54,655 with interest at 6% per annum from November 1, 1935, until paid. The judgment of Mrs. Lillian Iddings is for $7,616.40 with interest at the same rate from December 22, 1936, until paid. Therefore, the total amount of the judgments entered by the Federal court exceeds the total uncollected benefits, as stated by the respondent's own witness. It will probably be argued, however, that the Federal court can collect its judgments from the interest on the $100,000 of benefits which were not released by the decrees in the Johnson case and the Fish case. In the first place, no doubt many persons paid their drainage taxes upon lands of little value and, later, allowed them to forfeit. Lands which are so worthless that their owners do not consider them worth the drainage taxes would be of no benefit to the creditors.

In the second place, we submit that the judgment creditors are entitled to the advantages and security of the full assessment of benefits, which makes it certain that their judgments will be paid. Moreover, the judgment creditors

have no priority over other creditors, and there is nothing in the record to show that the District may not be indebted to persons other than the Bank and Mrs. Iddings.

Finally, even if the contention made by counsel for the respondent were correct, it would not constitute an answer to the petitioners' position that the judgment of the Federal court is entitled to full faith and credit. In the case of *State Bank & Trust Company* v. *Kersh Lake Drainage District*, the District pleaded in its answer that it had been enjoined by the Lincoln Chancery Court from collecting assessments against the lands involved in the Johnson and Fish cases. In spite of that plea, the Federal court ordered that an assessment be levied and collected upon every tract of land in the District. The plain effect of that judgment was to overrule the plea made by the District, which we have heretofore shown to be binding upon all property owners in the District, and to decide the matter in favor of these petitioners. The question is, therefore, foreclosed by the operation of the doctrine of *res judicata*, and it is no longer of the slightest importance that there might possibly be other sources for the collection of the judgment entered by the Federal court.

Respectfully,

GEORGE B. ROSE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS....*Petitioner*

v. No. 595

A. J. JOHNSON.....*Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR PETITIONER

GEORGE B. ROSE,
Counsel for Petitioner.

PARAGON PRINTING CO., LITTLE ROCK

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REPLY BRIEF

We feel that we should call attention to a few errors and omissions in respondent's brief.

Counsel make no allusion to the numerous decisions of this Court, cited in our brief (page 18 et seq) holding that no injunction of a State Court can prevent a Federal Court from enforcing its judgment; and that it makes no difference whether the injunction decree was rendered before or after the decree of the Federal Court, nor whether the plaintiff in the Federal Court was a defendant in the injunction suit or not. We believe that this ground alone is entirely sufficient to warrant the issuance of a writ of certiorari; and apparently counsel are wholly unable to answer the argument advanced in our original brief.

Counsel make no reference to the fact that under the decision of the Supreme Court of Arkansas in the case of *Howard-Sevier Road Improvement District* v. *Hunt*, 177 Ark. 62-72 (see our brief page 25), the Commissioners were bound to plead any defense which could have been set up by the property owners; and that in pursuance to this decision the District pleaded in the Federal Court as *res judicata* both of the judgments rendered in the injunction suits brought by Johnson and by the Fishes against the Commissioners of the District, to restrain them from collecting anything more than the face of the assessments without interest (Tr. 38). The District Court filed no opinion; but it could not have rendered its decree without overruling this defense, and it is, therefore, conclusively shown that the plea of *res judicata* was denied.

Counsel do not controvert the self-evident propositions sustained by many authorities cited in our brief (p. 28) that the last decree in matters of *res judicata* is controlling, and that this decree of the Federal Court, affirmed by the Circuit Court of Appeals, is conclusive.

Counsel say on pages 3 and 7 of their brief that the only thing decided by the Circuit Court of Appeals in the case of *Kersh Lake Drainage District* v. *State Bank & Trust Company of Wellston*, 92 Fed. (2d) 783, was that the Court below properly instructed the Commissioners to bring suit to foreclose the lien of the delinquent taxes. If counsel had looked to the opinion they would have found that sections 1, 2, 3, 4, 6 and 7 all hold that the assessment of benefits bore interest at the rate of six per cent.

The Court also decided in its opinion that the Court below properly commanded the Commissioners of the District to act as its receivers in effect, as authorized by the decision in *Dickinson* v. *Minyea*, 191 Ark. 946.

It also decided that there was no error in the decree of the Court below.

Counsel say that the defense interposed by Johnson that he had paid the principal of his assessed benefits without interest was a special defense not concluded by the decree of the Federal Court. That decree (Tr., p. 20) found that the entire assessment of benefits bore interest at six per cent per annum, and it was affirmed by the Circuit Court of Appeals in every particular. It was decided by both these courts that the assessment on every parcel of ground in the District bore interest. It was not a special defense of Johnson's. He might have shown that he had paid the entire assessment of benefits with interest as adjudged by the Federal Court, and that plea would have been tenable, but he makes no such pretense. He only says that his assessment of $1600 was discharged by payment aggregating $1628 (Tr. 5), though interest at six per cent from 1913, (Appendix 13) or even from 1919, when the last statute was passed making benefits bear interest (Appendix 15), would have fully doubled the amount of the assessment.

Counsel say that the State Bank and Trust Company, for whose benefit the suits were brought, is not prejudiced by the injunction suits because abundant benefits remain to be collected. Their one witness (our brief page 30) says that the uncollected benefits amount only to $52,119.40, while the judgments, with interest, exceed $70,000.

Counsel ignore the fact that the Commissioners were acting as receivers in effect of the Federal Court in bringing the suit to foreclose the lien of the taxes, and treat it as if it were a mere suit brought by the Commissioners of their own volition, and responsible to no one for their action. When a suit is brought by a receiver, it is of course for the benefit of the parties entitled to his action, which, in this case, were the State Bank & Trust Company of Wellston and Mrs. Iddings. This suit for mandatory injunction was like a suit in mandamus, and in either case, the Bank and Mrs. Iddings were the relators.

Counsel say (page 8 of their brief) that the Federal Court only directed the Commissioners to bring suit. At the same time, it adjudicated that the Commissioners should act as its Receivers; it held that all the benefits bore interest at six per cent (Tr. 20); and its direction to them to bring suit necessarily meant that they should bring suit for the amount of the taxes adjudicated by the Federal Court, and until the indebtedness was fully paid or the assessments with six per cent interest thereon were exhausted.

Counsel cite the decision of this Court in the case of *Chicot County Drainage District* v. *Baxter, et al,* rendered on January 2, 1940, as showing that the decree in the injunction suits bound the holders of the certificates of indebtedness, including the Bank. In that case this Court laid down the rule, which it had laid down innumerable times before, that no judicial proceeding can bind a party unless he is notified and has an opportunity to defend. In that case the Court said:

> "The answer in the present suit alleged that the plaintiffs (respondents here) had notice of the proceed-

ing and were parties and the evidence was to the same effect, showing compliance with the statute in that respect. As parties these bondholders had full opportunity to present any objections to the proceeding not only as to its regularity or the fairness of the proposed plan of readjustment or the propriety of the terms of the decree, but also to the validity of the statute under which the proceeding was brought and the plan put into effect."

Here, none of the holders of the certificates of indebtedness were parties to the suit and it is not shown that any of them had notice of the proceeding. Counsel say that it must be presumed that they knew all about it because their certificates were in default; but no holders thereof could anticipate such a proceeding on the part of the landowners. The certificates were negotiable, and they had bought them on the faith of statutes and decisions of the Arkansas Supreme Court upholding them, which made the benefits bear interest; and it would never have occurred to any of them that the property owners of the District would deny the force of those statutes and decisions, or that any Court would render such a decision.

Counsel say (their brief page 9) that they proved in their injunction suits that the tax sued for was not owing. They only proved that they had paid taxes amounting to the face of the benefits without interest. The Federal Court and the Circuit Court of Appeals had both decided that they bore interest at six per cent per annum, and those decisions bind all the property owners of the District.

Counsel say that this Court can afford no remedy because the Bank and Mrs. Iddings, holding the judgments in the Federal Court, are not parties to this proceeding. It

is sufficient to say that the suit is brought by the Commissioners who were required to act as receivers in the case in which the Bank was plaintiff and Mrs. Iddings was intervener. The suit was brought for their benefit, and the Commissioners as Receivers represented them.

Counsel say on page 11 of their brief that there is nothing in this record to show that the certificate holders were not advised of the injunction suits. Before a person can be held bound by a decree it must be shown that he was a party to the litigation or claims under a party thereto. Only parties and privies can be bound by a judgment.

Counsel say that (page 12 of their brief) there is nothing to show that the decree in the case brought by the two Fishes was collusive. Where a matter appears plainly on the face of the record, there is no necessity of oral evidence. The record here shows that the Commissioners who were defendants in the Fish injunction suit profited by the suit against them in a decree which relieved them of benefits aggregating $29,789.46; and that they took no appeal from the decision, though at that time there were numerous decisions of the Supreme Court of Arkansas holding that the statutes making benefits bear interest were valid.

The cases in which the Supreme Court of Arkansas had upheld the validity of statutes making assessments of benefits bear interest, decided prior to the decrees in the injunction suits of 1931 and 1932, and the year of the rendition of the decisions are as follows:

Olliver v. *Whittaker*. 122 Ark. 291, (1916); *Jones* v. *Fletcher*, 132 Ark. 328, (1918); *Skillern* v. *White River*

Levee District, 139 Ark. 4, (1919); *Phillips* v. *Tyronza Imp. Dist.*, 145 Ark. 487, (1920); *Pfeiffer* v. *Bertig*, 141 Ark. 531, (1920); *Summers* v. *Cole*, 144 Ark. 494, (1920); *Delinquent Lands* v. *Cache River Dr. Dist.*, 158 Ark. 581, (1923); and *Chicago Mill & Lumber Co.* v. *Drainage Dist. No.* 17, 172 Ark. 1059, (1927).

In the cases of *Skillern* v. *White River Levee District* and *Chicago Mill & Lumber Co.* v. *Drainage Dist. No.* 17, just cited, the statutes making the assessments of benefits bear interest were passed after the Districts had issued their bonds and done a part of their work.

Respectfully submitted,

GEORGE B. ROSE,

Counsel for Petitioner.

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IN THE

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OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS, ET AL. ..... *Petitioners*

vs. No. 595

A. J. JOHNSON ..... *Respondent*

ON CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONERS ON FINAL HEARING

GEORGE B. ROSE,
Counsel for Petitioners.

PARAGON PRINTING CO. LITTLE ROCK

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vs. No. 595

A. J. JOHNSON.....*Respondent*

ON CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONERS ON FINAL HEARING

OPINION OF COURT BELOW

The opinion of the Court below has not yet appeared in the official reports; but a copy of it will be found on page 47 of the Record. The dissenting opinion of three of the seven Justices appears on page 65 of the Record. The original opinion appears in 131 SW (2d) 620, and the dissenting opinion in 132 SW (2d) 658.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The writ of certiorari was granted on the following statement of the questions presented:

1. Can a State court enjoin the collection of a tax authorized by State law and ordered by a United States court to be collected for the purpose of raising money to pay a judgment rendered by it?

2. Can a State court deny all faith and credit to a judgment of a Federal court brought to its attention by proper pleading and duly certified as the law requires?

3. Can the holders of a judgment against an improvement district, rendered by a Federal court, be deprived of the means of collecting their judgment by an injunction against the collection of the improvement taxes, issued in a suit brought by a landowner of the district against the district and its commissioners, in which these are the only parties, and where no notice was given to creditors and they were given no opportunity to be heard? Or would the injunction decree be void as to creditors because it would deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

These questions were restated, to show how they arose in the case, as follows:

(1A) When a United States District Court has rendered a money judgment against an improvement district in 1935, and in 1936 had adjudged that the assessment of ben-

efits of the district bore interest at 6% per annum, and had decreed that the commissioners of the district act as its receivers in effect, all in accordance with State statutes and repeated decisions of the State Supreme Court, and has commanded the commissioners to bring suit to collect the delinquent taxes levied by the proper State court to pay the debts of the district, which taxes can be collected only by a suit to foreclose the lien thereof, and the decree of the District Court has been affirmed by the Circuit Court of Appeals, and suit to foreclose the improvement tax lien has been brought by the commissioners acting as receivers in effect of the District Court, can such suit be defeated by a plea of *res judicata* based on decrees rendered in 1931 and 1932 by a State court in two suits brought by landowners against only the district in one case and against only the district and its commissioners in the other, to which no creditor was a party and no notice to creditors is shown?

The decree exhibited with the plea of *res judicata* shows that the defendant commissioners were the largest landowners in the district, and were the greatest beneficiaries of the decree, which forever enjoins them as commissioners from proceeding to collect further taxes amounting to $29,789.46 on their own lands because they have paid taxes to the amount of their assessed benefits without interest. They took no appeal from the decree, though it would certainly have been reversed. Will the fact that the decree was plainly collusive affect the result?

(2A) When suit was brought to foreclose the lien of the improvement taxes as above set forth, and a plea of *res judicata* was filed on behalf of the landowners, setting

up said decrees of 1931 and 1932, the commissioners, acting as receivers in effect of the District Court, amended their complaint, pleading the decree of the District Court affirmed by the Circuit Court of Appeals as *res judicata*. The State Chancery Court accepted this as controlling, and rendered a decree foreclosing the lien of the delinquent improvement taxes. On appeal the Supreme Court of Arkansas rendered a decree sustaining the defendants' plea of *res judicata*, and forever enjoining the collection of further improvement taxes on the lands released by those decrees. In so doing did it give due faith and credit to the decree of the United States District Court?

(3A) When the Supreme Court of Arkansas entered its decree as above set forth, which, if effective, will deprive the holders of the judgments in the Federal court, who are the real parties in interest in this case, of all means of collecting their judgments, did its decree deprive the holders of the Federal court judgments of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This statement is longer than we could wish, but we believe that every word in it is essential to an understanding of the case. We have not been able to shorten it.

This District was duly organized by the Jefferson Circuit Court in August, 1912, under the general drainage law of Arkansas (Acts of 1909, p. 829). The material parts of this and all other statutes referred to herein are in the appendix. Its benefits were assessed at $293,600.

On March 13, 1913, the statute was amended to make the benefits bear interest at 6% per annum. (Ark. Acts 1913, p. 746; Pope's Dig., Sec. 4494). On March 28, 1919, a statute was passed making the benefits of all drainage districts, whether created by special acts or organized under the general law, bear interest at the same rate (Ark. Gen. Acts of 1919, p. 343; Pope's Dig. Sec. 4507).

The statute authorizes such districts to issue to the contractors who do the work negotiable evidences of indebtedness. The district let the contract, and as the work progressed issued negotiable certificates of indebtedness to the amount of $185,500, payable serially through the years until August 1, 1934. These were paid as they matured until August 1, 1929, when the district defaulted.

In 1913 a drainage tax of 3% of the benefits was levied by the Jefferson Circuit Court. As the certificates of indebtedness were issued higher taxes were levied. Finally in 1924 the court levied a drainage tax of 6½% to continue until the last of the certificates of indebtedness were paid. (See findings in decree of U. S. Dist. Court (R. 20).)

The State Bank & Trust Company of Wellston, Missouri (hereinafter called the Bank), which held a number of the defaulted certificates of indebtedness, brought suit upon them in the United States District Court for the Western Division of the Eastern District of Arkansas. The case was transferred to equity, and on November 1, 1935, the Bank was awarded a judgment for $54,655.00, with interest thereon at 6% (R. 21). This case was carried by the Drainage District to the Circuit Court of Appeals, where the decree was affirmed, 85 F. (2d) 643 (R. 36-37).

Under the law of Arkansas, when an improvement district has made default for 30 days in the payment of any debt, any creditor may, by mandatory injunction, compel its commissioners to act as receivers of the court (Act 46 of 1933; *Dickinson* v. *Mingea*, 191 Ark. 946, 951.) The Bank brought suit in the same court for this purpose. The District defended on the ground that the statutes making the benefits bear interest were passed after the District was organized and the benefits assessed, and for that reason were inapplicable to this District. The District further alleged in its answer that the property owners who had paid the face amount of assessed benefits against their lands without interest had obtained a decree in the Lincoln Chancery Court in the case of *W. A. Fish et al.* v. *Kersh Lake Drainage District* on June 15, 1932, enjoining the Commissioners of the District from levying or extending any tax against these lands, the assessed benefits of which without interest had been fully paid (R. 32). Pursuing this same contention, the District, in its requested declarations of law, asked the court to declare that under no circumstances should the Bank have a mandatory injunction against the District and its Commissioners except to have taxes levied

and extended against the unpaid assessments of benefits against those lands wherein the assessments of benefits without interest had not been fully paid (R. 18).

The Supreme Court of Arkansas had repeatedly decided that the statutes making the benefits bear interest were valid. In three of these cases, the statute was passed after the bonds were sold and the work begun or finished. Having before it this plea, and also the plea that the Commissioners of the District had been restrained from collecting further assessments against the lands involved in the Johnson and Fish cases, together with the District's requested declaration of law that the mandatory decree shall not apply to lands against which the assessments or benefits without interest had been fully paid, the District Court rendered a decree on December 22, 1936, that the benefits bear interest at 6% from the date of their confirmation in 1913. This decree directed that the county clerks in the various counties in which the District lies, who were made defendants, extend upon the tax books of their respective counties a tax of 6½% of the benefits assessed against *each* tract of land in the District for each of the years 1936 and the following years until the whole of the decree should be satisfied (R. 21). The decree further provided that the commissioners should act as receivers of the court, and as such bring suit to collect all delinquent taxes of the District, which are collectible only in this way (R. 21-22).

Mrs. Lillian Iddings, who had intervened as the holder of some of the certificates of indebtedness, and obtained judgment, was made a beneficiary of the decree (R. 21). (Although the record shows that the judgment in favor of Mrs. Iddings was in the amount of $3,222.24, this was in fact a clerical error, which was later corrected. The final judg-

ment in her favor as actually entered by the Federal court, which does not appear in this record, was admittedly in the amount of $7,616.40).

The District appealed this case to the Circuit Court of Appeals, where the decree was affirmed. *Kersh Lake Drainage District* v. *State Bank & Trust Company of Wellston*, 92 F. (2d) 783 (R. 37).

The Commissioners, in obedience to the order of the District Court, brought suit in the Lincoln Chancery Court for the foreclosure of the delinquent assessments (R. 1). All the landowners made default except A. J. Johnson. He filed an answer in behalf of himself and all other landowners similarly situated (R. 3).

In this answer he alleged that his land was assessed at $1,600, and that he had paid $1,628. In fact, the benefits had borne interest at 6% from 1913 to 1937, and the assessment had been at least doubled.

He also filed a copy of a decree rendered October 19, 1931, by the Lincoln Chancery Court in an injunction suit brought by him against the District (R. 6), where the court found that his assessment of $1,600 was discharged by the payment of $1,628, and he pleaded this as *res judicata* (R. 3).

He likewise filed a copy of a decree of the same court rendered in an injunction suit brought by two persons named Fish against the District in 1932 (R. 8). This decree shows that upon the filing of the suit an auditor was appointed by the court to ascertain what drainage taxes had been paid on each tract of land; and the decree enjoined

the collection of all drainage taxes on lands whose owners had paid an amount equal to the original assessment without interest. The amount released by this decree was $197,630.00.

The only defendant in the Johnson suit was the District. The only defendants in the Fish suit were the District and its Commissioners. The only plaintiff in the Johnson case was Johnson himself. The only plaintiffs in the Fish suit were the two Fishes. The number of landowners whose assessments were satisfied was 102. Amongst these were the three Commissioners, who were relieved of drainage assessments amounting to $29,789.46, as follows: Holthoff, Chairman of the Board, $15,283.12; Free, $7,577.50; Gantt & Warren, $6,928.84. Warren was the third Commissioner.

Though these decrees would certainly have been set aside by the Supreme Court of Arkansas because they allowed nothing for interest, as required by its repeated decisions, no appeal was taken by the Commissioners, though it was their duty to do so as trustees for the District and its creditors. Their present change of attitude is explained by the fact that they are now acting as receivers of the Federal Court.

When this answer was filed, the District filed an amendment to the complaint in its suit to foreclose drainage taxes, setting up the decrees in the District Court as *res judicata*, and filing with it certified copies of the decrees and of the pleadings in both cases (R. 24). In its amended complaint, the District raised the Federal questions now relied upon by it for reversal of the judgment of the Supreme Court of Arkansas.

The chancellor entered a decree overruling the defenses and foreclosing all the delinquent assessments (R. 41).

Johnson appealed to the Supreme Court of Arkansas. In their brief in that case the petitioners again insisted upon and argued the Federal questions now presented to this Court. On May 29, 1939, the Supreme Court of Arkansas, by a four to three decision, reversed the decree of the trial court, holding that the decrees rendered in 1931 and 1932 in the injunction suits brought by Johnson and Fish were *res judicata*, precluding the collection of any further drainage taxes on the land therein described (R. 47).

The petitioners, in apt time, filed a petition for rehearing (R. 56), in which the Federal questions now relied upon were again brought to the attention of the Supreme Court of Arkansas. This petition was overruled on October 2, 1939 (R. 63).

The Supreme Court of Arkansas is the last court of that State to which the case could be carried.

The only evidence as to the amount of benefits yet to be collected is the statement of Victor Felly, witness for respondent, who gives the amount as $52,119.40 (R. 41). The judgment of the Bank is $54,654 with interest at 6% from November 1, 1935, and that of Mrs. Iddings is $7,616.40 with like interest from December 26, 1936. It is, therefore, evident that if all the assessments were paid, which is incredible, the benefits without interest would lack $25,807.93 of sufficing to pay the judgments of the Federal court as they stand on March 4, 1940.

The material parts of the decree of the Federal Court are as follows:

The defendant asked the Court to make a finding of fact that:

> "* * *, the postponed installments of benefits were to be paid in amounts maturing annually, *without interest.*" (R. 18)

This was refused by the Court.

The defendant also asked the following finding of fact:

> "That the plaintiff seeks to require additional tax to be levied and collected from those lands, *the original assessment on which lands has been fully paid and the lien thereon discharged.*" (R. 19)

This was also refused by the Court.

The court made the following findings of fact:

> "* * * The Commissioners then made an assessment of benefits which amounted to $293,191.90, and *which bore interest at the rate of six per cent per annum.* * * * The total amount of the certificates of indebtedness issued amounted to $181,500.00, which were payable serially through the years 1920 to 1934.
>
> "* * * It was first estimated that the work could be done for $135,000.00, and an annual tax was levied by the Circuit Court of Jefferson County of three per cent per annum, beginning at the annual collection of taxes on the first Monday of January, 1914. The taxes were collected at that rate from the year 1914 to 1916, inclusive. In that year the rate of taxation was raised to three and eight-tenths per cent per annum, and the taxes were collected at that rate from the year 1917 to 1919, inclusive. In 1920 the taxes were raised to six and five-tenths per cent, and they were collected at that rate through the years 1920 and 1921. They were then raised to eight and five-tenths per cent per annum,

and collected at that rate through the years 1922 and 1923. *They were then lowered to six and five-tenths per cent per annum, which, by the terms of the order of the Jefferson Circuit Court levying them, was to continue until the last of said certificates of indebtedness should be paid.*" (R. 20).

The Court made the following finding of fact:

"Nothing has been paid upon the judgment recovered by the plaintiff nor upon the certificates of indebtedness held by the intervener." (R. 21).

The Court then entered the following decree:

"It is Therefore, Considered, Ordered and Decreed that a mandatory injunction issue requiring the defendant County Clerks, N. M. Ryall and N. D. Newton to extend upon the tax books of their respective counties a tax of six and one-half per cent of the benefits assessed *against each tract of land, railroad and tramroad in the district for each of the years* 1936 *and the following years until the whole of this decree has been satisfied,* and that the said W. A. Dodds, as collector of Lincoln County, and H. L. Clayton, Collector of Desha County, be required to collect said drainage tax along with the County and State taxes, and to pay the same over to the Clerk of this Court until the sums hereinbefore mentioned have been paid to the plaintiff and to the interveners.

"It is Further Considered, Ordered and Decreed that the defendants, T. H. Free, Claude H. Holthoff and Emmett Warren, as Commissioners of said district be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary as commissioners of said district to insure the prompt collection of the drainage taxes: *and the said Commissioners of said district are deemed receivers of this Court, and as such they are required*

to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes." (R. 21, 22).

The Court below disregarded the fact that in the suit in the Federal Court, in which the Commissioners were made receivers, the plea of *res judicata* relied upon by the respondent was filed, and necessarily decided against the respondent in the rendition of the decree therein. For the convenience of the Court, we repeat the allegations of the answer making said plea:

"Seventh. That there has been levied and extended against the value of the assessed benefits in said District a total of One Hundred Eleven per cent (111%), and that as a result of said levy and extension of taxes a large number of tracts of land in the District have fully paid the entire value of assessed benefits against said lands and that said property owners obtained a decree in the Lincoln Chancery Court in the case of *W. A. Fish, et al.* v. *Kersh Lake Drainage District* on June 15, 1932, enjoining and restraining the Commissioners of the defendant District from levying or extending any tax against those lands, the assessed benefits of which has been fully paid. That said decree appears of record in Equity Record "I" at page 23 of the Records of Lincoln County, Arkansas, reference to which is hereby made and same made part hereof." (R. 32.)

ERRORS INTENDED TO BE URGED

1. The Supreme Court of Arkansas erred in holding that when a party had recovered judgment against an improvement district in a Federal Court, and in supplemental proceedings had duly obtained a decree requiring the commissioners of the district to act as receivers of the Federal Court and to bring suit as such to collect the taxes of the district, which had been duly levied, in order to pay the judgment, the landowners of the district could defeat such foreclosure suit by showing that they had obtained an injunction in the State Court restraining the commissioners from proceeding to collect the tax.

2. The Supreme Court of Arkansas erred in holding that a decree of a State Chancery Court enjoining the collection of drainage taxes of the District, which was rendered prior to the judgment of the Federal District Court, and pleaded as *res judicata* in bar of the suit in the Federal Court, and overruled by the decree of the Federal Court, was properly pleaded as *res judicata* in bar of a suit to collect the drainage taxes commanded to be brought by the mandatory injunction of the Federal Court.

3. The Supreme Court of Arkansas erred in holding that the plaintiffs in a judgment against an improvement district rendered by a Federal Court could be deprived of the means of collecting their judgment by an injunction against the collection of improvement taxes issued in a suit brought by landowners of the District against the District and its Commissioners, in which these were the only parties, and where no notice was given to the creditors and they were given no opportunity to be heard, and in holding

that such a judgment would not deprive the plaintiffs in the Federal Court of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, particularly when the injunction was obtained in a collusive suit.

SUMMARY

No. 1. No injunction issued out of a State Court will be allowed to interfere with the collection of a tax ordered by a Federal Court to be levied and collected for the purpose of paying a judgment rendered therein. *Riggs* v. *Johnson County*, 6 Wall. 166; *U. S.* v. *Council of Keokuk*, 6 Wall. 514; *The Supervisors* v. *Durant*, 9 Wall. 415; *The Mayor* v. *Lord*, 9 Wall. 409; *Hawley* v. *Fairbanks*, 108 U. S. 543; *Gaines* v. *Springer*, 46 Ark. 502. The Supreme Court of Arkansas erred in holding otherwise.

2. The Supreme Court of Arkansas erred in denying full faith, credit and effect to the judgment of the Federal Court entered in pursuance of a State statute and of decisions of the Supreme Court of Arkansas, ordering the Commissioners of the Improvement District to bring suit as its receivers for the collection of taxes of the District duly levied by the proper State authority, and in holding that injunctions issued in suits brought by property owners to enjoin the collection of taxes would be a bar to the collection of such taxes when the decrees in such injunction suits had been pleaded in bar in the Federal Court, and the plea had been overruled by that Court, Art. IV, Sec. 1; paragraph 2 of Art. VI of the Constitution of the United States; Section 905 of Revised Statutes; *Chandler, Receiver* v. *Peketz*, 297 U. S. 609; *Stoll* v. *Gottlieb*, 305 U. S. 165; *Knights of Pythias* v. *Meyer*, 265 U. S. 30-33; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Metcalf* v. *Water-*

town, 153 U. S. 671; *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 146; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507; *Des Moines Navigation & Railroad Co.* v. *Iowa Homestead Company*, 123 U. S. 552, 559; *Embry* v. *Palmer*, 107 U. S. 3, 10.

3. The Supreme Court of Arkansas erred in holding that the plaintiffs who had recovered judgment in the Federal Court were not deprived of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by its holding that judgments in suits brought by three taxpayers of the District to enjoin the collection of the drainage taxes, of which suits the creditors had no notice and no opportunity to be heard, could be pleaded in bar of the judgment of the Federal Court, particularly as the suits in the State court were collusive and the greatest beneficiaries therein were the Commissioners of the District, who took no appeal from the decree, although the Supreme Court of Arkansas had many times decided that the benefits bore interest and would certainly have reversed the decree. *Windsor* v. *McVeigh*, 93 U. S. 274; *Hagar* v. *Reclamation Dist. No.* 108, 111 U. S. 701; *Ochoa v. Hernandez*, 230 U. S. 139; *Scott* v. *McNeal*, 154 U. S. 34; *Hale* v. *Finch*, 104 U. S. 261; *Wabash Railroad v. Adelbert College*, 208 U. S. 39; *Empire* v. *Darlington*, 101 U. S. 87; *Brooklyn* v. *Insurance Co.*, 99 U. S. 362.

ARGUMENT.

STATE COURTS WILL NOT BE PERMITTED TO PREVENT THE ENFORCEMENT OF JUDGMENTS OF THE FEDERAL COURTS

It is established by the decisions of this Court that the Federal Courts will not permit any judgment or act of any State Court to stand in the way of the enforcement of the judgment of the Federal Court. The question has mostly arisen in cases like this where judgments have been rendered by the Federal Court against political bodies of a State requiring them to levy a tax to pay a judgment of the Federal Court, and where the defendants pleaded a decree of a State Court enjoining the collection of the tax.

The leading case on the subject is *The Supervisors* v. *Durant*, 9 Wall. 415. There a county had issued bonds in aid of certain railroads, and the electors had voted to levy an annual tax to pay the interest. Some of the bonds were purchased by Durant. Certain taxpayers of the county filed a bill in the State Court to enjoin the levying of any taxes to pay either principal or interest of the bonds. Durant appeared in the case and opposed the injunction, but the State Court found in favor of the plaintiffs, and enjoined The Supervisors. Thereafter, Durant brought suit in the Federal Court and obtained judgment against the county on his bonds. The Federal Court granted a mandatory injunction against The Supervisors requiring them to levy the tax. The County appealed to this Court, pleading in bar the injunction granted by the State Court in the earlier case. This Court affirmed the judgment of the lower court, saying at pages 418 and 419:

"In *Riggs* v. *Johnson County*, where it appeared that an injunction had been obtained in one of the State Courts, upon the county commissioners, enjoining them against levying any tax to pay certain municipal bonds and coupons, a mandamus was nevertheless sustained to compel the levy of a tax, at the suit of one who had obtained judgment in the Circuit Court for some of the coupons. That case is full authority for the doctrine that an injunction of a State court cannot control, or in any manner affect the action, the process, or the proceeding of a Circuit Court, not because the latter has any paramount jurisdiction over State courts, but because the tribunals are independent of each other. It is true that in *Riggs* v. *Johnson County* it appeared the relator in the information, or suggestion for the mandamus, was not a party to the injunction suit, while the relator here was a party defendant. That, however, can make no difference. The present relator, though made a party with the other defendants, was not enjoined. The decree upon the bill for an injunction was exclusively against the board of supervisors of Washington, at the suit of others than the relator. And had he been enjoined, it is not easy to see how that fact could have limited the power of the Circuit Court.

* * * * * * *

"It is of course immaterial whether the injunction of the District Court of Washington County was before or after the judgment obtained by the relator in the Circuit Court of the United States, or whether before or after the institution of the suit. It is not a question which court first obtained possession of the case. In the case of *The Mayor* v. *Lord*, the facts were that the plaintiffs in error had been enjoined against levying a tax before suit was brought in the Circuit Court, yet it was held that the injunction was no sufficient answer to the alternative mandamus commanding them to levy a tax to pay the judgment afterwards recovered."

A similar situation was presented to the Court in the case of *Hawley* v. *Fairbanks*, 108 U. S. 543, where the Court said at page 551:

> "The relator was not a party to the suit in which the injunction was obtained, and, consequently, is not bound by it. Having established her right to the tax by the judgment of the circuit court in a suit to which the town in its corporate capacity was a party, she may use the power of that court to command the assessment and collection of the tax as a means of carrying the judgment into execution, notwithstanding what the taxpayers may have caused to be done in some proceeding to which the relator was not a party. The right to the computation and assessment, as well as the collection of the tax, followed as a matter of law from the establishment of the liability of the town for the payment of the interest which it was agreed should be made by the assessment and collection of the tax. An injunction against the officers before the judgment against the town was rendered cannot stand in the way of the enforcement of the tax by the circuit court to carry its judgment into execution."

Several other decisions of this Court are in accord with the cases above cited. Among them are *Riggs* v. *Johnson*, 6 Wall. 166; *U. S.* v. *Council of Keokuk*, 6 Wall. 514; *The Mayor* v. *Lord*, 9 Wall. 409. These cases have established the law to be that it makes no difference whether the decree of the State Court was rendered before or after the bringing of the suit in the Federal Court; nor does it make any difference whether the plaintiff in the suit in the Federal Court was made a defendant in the injunction suit in the State Court. In no event can an injunction from a State Court stand in the way of the enforcement of a judgment rendered by a Federal Court.

THE SUPREME COURT OF ARKANSAS DENIES ALL FAITH AND CREDIT TO THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES, THOUGH IT HAD BEEN AFFIRMED BY THE CIRCUIT COURT OF APPEALS

It is the established law in Arkansas that in a suit against an improvement district, it represents all its landowners. In *Howard-Sevier Road Improvement District* v. Hunt, 166 Ark. 62, at p. 71, the Supreme Court of Arkansas says:

> "The judgment of the District Court of the United States, Western District of Arkansas, in which the Guardian Savings & Trust Co., as trustees for bondholders, instituted an action against the district and its commissioners, and in which the plaintiff sought to validate and collect the first installment on mortgage bonds of the district in the sum of $380,000, was likewise *res judicata* of the appellee's contentions in the case in hand. *The district, in that case, represented the taxpayers, and they were bound by the judgment of the Federal Court.* (Citing cases.)
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> . . . . . .
>
> "The judgment of the United States District Court, after setting out the bonds, recited: They are 'the valid obligations of said district, and are each duly secured by a first mortgage on the assessment of benefits of said district, bearing even date to the bond issue, and duly recorded.' The judgment in that case was duly pleaded and in evidence in these consolidated causes. It was the duty of the trial court to give full faith and credit to this judgment. (Citing cases.)"

Neither the State Bank & Trust Company of Wellston nor any other party holding indebtedness of the District

was a party to the suits to enjoin the payment of the drainage tax which were brought in the Chancery Court of Lincoln County, nor were they notified of their pendency.

Prior to the passage of Act 46 of 1933, it was provided by statute in Arkansas that if an improvement district was in default for thirty days in the payments of its bonds or interest thereon any bondholder could put the District into the hands of a receiver. The statute so providing appears in the appendix. On February 18, 1933, the Legislature passed Act No. 46 which is in the appendix, and the material part of which is as follows:

> "Section 1. Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by a mandamus, *or by a mandatory injunction in equity,* at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes."

The remedy by the appointment of a receiver was probably the most effective means of securing the payment of the debts of improvement districts that was ever devised. It took the management out of the hands of the commissioners, who must be landowners and who are usually, as in this case, the largest landowners, and who would have to pay their share of any debts of the District, and

put its affairs in the hands of an independent receiver, who would prosecute vigorously the necessary suits to collect the improvement taxes. It is a fundamental rule, often announced by this Court, that when you take away from the creditors one remedy, you must give them another substantially as efficient.

With this in mind, the Supreme Court of Arkansas, when the validity of an identical Statute came before it, in the case of *Dickinson* v. *Mingea*, 191 Ark. 946, held that under its provisions the commissioners would be in effect the receivers of the court, saying:

> "There appears in the preamble to each of these acts the following paragraph: 'Whereas the collection officers provided by law can collect improvement district taxes more expeditiously and at less expense than receivers, if they are made to discharge their duties.' The significance of the phrase 'if they (the commissioners of the district) are made to discharge their duties' is not to be overlooked. The verb 'made' as here employed means to require or compel. But how are the commissioners to be 'made' to discharge their duties? Section 1, above quoted, answers 'by mandamus or by a mandatory injunction in equity.' There is therefore no abridgement of the court's jurisdiction. *The commissioners become receivers in effect in that they become subject to the jurisdiction of the court. The commissioners would thereafter report to and be supervised by the court just as a receiver would be to the end that they were 'made' to discharge duties imposed upon them by law.* The receivers could do no more than follow and be governed by the law."

That language was quoted with approval in the same court in *Rogers Paving Imp. Dist.* v. *Swafford*, 193 Ark. 260.

In pursuance to these decisions the United States District Court, in the case of *State Bank & Trust Co. of Wellston* v. *Kersh Lake Drainage District*, included in its decree the following provisions:

> "It is Further Considered, Ordered and Decreed that the defendants, T. H. Free, Claude H. Holthoff and Emmett Warren, as Commissioners of said district, be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary as commissioners of said district to insure the prompt collection of the drainage taxes; *and the said Commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes.*"

The Court below apparently overlooked this latter portion of the decree of the Federal Court, for in copying the decree in its opinion it omitted the portion which we have placed in italics, (R. 49) though it was called to its attention by counsel, and urged as showing that this was no ordinary suit to foreclose tax liens, but a suit brought by the Commissioners acting as receivers of the Federal Court.

From the decree in that case making the commissioners of the District its receivers, and levying on the land a tax of 6½ per cent of the benefits per annum until its judgments were paid in full, the defendant appealed to the Circuit Court of Appeals for the Eighth Circuit, which, in the case of *Kersh Lake Dr. Dist. v. State Bank & Trust Com-*

pany of Wellston, 92 F. (2d) 783, affirmed the action of the District Court (R. 37).

In the case of *Kersh Lake Drainage District* v. *State Bank of Wellston*, 92 Fed. (2d) 783, the Court said that the interest on the assessed benefits prescribed by the Act of 1919 would be far more than sufficient to satisfy the federal court judgments and that therefore it would not consider the Act of 1913. Act 467 of 1919 is as follows:

Section 1. Where assessments of benefits have been made in drainage districts organized either under general or special acts, the property owner shall have the right to pay such assessments in full within sixty days after the passage of this Act, but if he does not avail himself of this privilege, *the assessment of benefits shall bear interest at the rate of six* (6%) *per cent per annum*, and shall be payable only in installments as levied. The interest need not be computed until necessary to be sure that the collections have not exceeded the total amount of benefits and interest; or the interest may be first collected. (Italics ours)

Approved March 28, 1919.

The suit, in which the judgment now sought to be reviewed was rendered, was brought in pursuance to the mandatory requirement of that decree, and was brought by the commissioners in their capacity as receivers of the Federal court. When the respondent filed his answer, setting up the decrees of the Lincoln Chancery Court rendered in 1931 and 1932 as *res judicata*, the District amended its complaint and pleaded the decree of the Federal court, rendered in 1936, and affirmed by the Circuit Court of Appeals in *Kersh Lake Drainage District* v. *State Bank & Trust Company of Wellston*, 92 F. (2d) 783, as *res judicata*,

and filed certified copies of the decree in that case and of the pleadings on which it was based (R. 18, 37). By stipulation of Counsel, duly filed, the pleadings, which did not seem to them essential, were not printed.

The Chancery Court gave full faith and credit to the decree of the United States District Court, and rendered its decree foreclosing the lien for the delinquent taxes on land on which the owners had paid drainage taxes to the amount of the original assessment without interest. The Supreme Court of Arkansas, however, reversed the case, holding that the decrees of 1931 and 1932, enjoining the collection of further taxes upon such lands, were *res judicata*, barring the prosecution of the suit.

This Court has decided many times that the State courts must give full faith and credit to the decisions of the Federal Court. Art. IV, Sec. 1, and paragraph 2 of Art. VI of the Constitution of the United States, Rev. Stat. 905; *Stoll* v. *Gottlieb*, 305 U. S. 165; *Knights of Pythias* v. *Meyer*, 265 U. S. 30-33; *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 645; *Metcalf* v. *Watertown*, 153 U. S. 671, 676; *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 146; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507; *Des Moines Navigation & Railroad Co.* v. *Iowa Homestead Company*, 123 U. S. 552, 559; *Embry* v. *Palmer*, 107 U. S. 3, 10.

In the case of *Howard-Sevier Road Improvement Dist.* v. *Hunt*, 166 Ark. 62, the court says on page 72:

> "*As the district represented the taxpayers, it was bound to plead for them any defense that could have*

been set up which would have rendered the bonds invalid, and a good defense would have been that, for any reason whatsoever, there was no valid assessment of benefits. *The district could, and should, have pleaded such defense for the benefit of the taxpayers.*"

Thus it is seen that the rule in Arkansas is that a District represents its taxpayers and must plead defenses for their benefit. In compliance with this principle, the Commissioners of the District, in the amendment to their answer in the Federal court pleaded that a decree of the Lincoln Chancery Court had enjoined them from collecting additional assessments upon the lands of property owners who had paid the full amount of their assessment without interest (R. 32, paragraph 7 of amendment to answer). The District emphasized this point by requesting the court to declare as a matter of law that its mandatory injunction should be limited to the collection of assessments upon lands wherein the full amount of the assessment of benefits without interest had not been paid (R. 18). Nevertheless, the Federal court required the county clerks to extend taxes against every tract of land in the District, and directed the Commissioners, as its receivers, to bring suit to collect all delinquent taxes (R. 21, 22).

The Federal court, therefore, necessarily decided that the plea of the District was not well taken and that its judgment should be collected by making an assessment against the property which was involved in the *Johnson* and *Fish* cases. In fact, the Federal court decree expressly found that the assessment of benefits did bear interest, which finding, when considered with its order that taxes be assessed against every tract of land in the District, amounted to an express rejection of the plea made by the District.

Since the District represented all property owners having land within its boundaries, the decree of the Federal court is as binding upon the respondent and those he represents in this case as if they had appeared personally and contested the right of the Federal court to disregard the injunction decrees entered by the Lincoln Chancery Court. Nevertheless, the Supreme Court of Arkansas has undertaken to give new life to the injunction decrees, which the Federal court has held not to be binding on these petitioners. Under the authorities heretofore cited, the Supreme Court of Arkansas has, therefore, denied all faith and credit to the decree of the District Court, even though that decree has been affirmed by the Eighth Circuit Court of Appeals.

The Supreme Court of Arkansas says that as the Federal Court directed the commissioners to bring suit, and the suit was brought in the State Court, this meant that the State Court was to have full discretion as to the judgment it would render. This contention is completely settled by the case of *Chandler, Receiver* v. *Peketz*, 297 U. S. 609. In that case the Federal Court in Minnesota, in winding up the affairs of an insolvent corporation, levied an assessment of 100 per cent upon the capital stock as authorized by the Statutes of Minnesota, and the receiver appointed in the case was directed to bring suit against the stockholders to recover the amount. Peketz, one of the stockholders, lived in Colorado, and the suit was brought there. The trial court there held, like the Supreme Court of Arkansas, that as the suit was brought before it, the decision should be in accordance with its views, and it refused to render judgment as required by the decree of the Federal Court. In this it was affirmed by the Supreme

Court of Colorado. This Court sent down its certiorari, brought the case up, reversed it and sent it back to the Supreme Court of Colorado, with directions to render a judgment in accordance with that of the Federal Court in Minnesota.

The case of *Hancock National Bank* v. *Farnum*, 176 U. S. 640, is precisely like the last. In winding up a Kansas corporation, the Federal Court in that State levied an assessment against its stockholders, and suit was brought upon this in a State Court in Rhode Island against a stockholder residing there. The Rhode Island Courts held that the stockholder was not bound; but this Court reversed that decision and held that the Rhode Island courts were bound by the judgment of the Federal Court in Kansas and remanded the case with directions to enter judgment accordingly.

THE DECISION OF THE SUPREME COURT OF ARKANSAS DEPRIVES THE HOLDERS OF THE JUDGMENTS IN THE UNITED STATES COURT OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

The decrees in the Chancery Court of Lincoln County could not affect the claims of creditors of the District.

In 19 R. C. L., 1059 the law is laid down thus:

> *"Neither a municipal corporation nor its officers is the natural legal representative of the holders of the bonds of the corporation, however honestly, ably or thoroughly they may manage the litigation, with a view of establishing the validity of the bonds and compelling just and prompt proceedings for their payment. It has consequently been generally, and perhaps universally, held that a judgment against a governmental body or its officers, when the validity of bonds has been drawn in question and denied, is not binding on a bondholder not a party nor in privity with the parties thereto, and hence that an injunction by a taxpayer against payment of such bonds or against raising money to provide for such payment is entirely unavailing, when demand for payment is made by one not a party to the former judgment."*

This Court has decided in many cases that the essence of due process of law is notice and the opportunity to be heard. *Windsor* v. *McVeigh*, 93 U. S. 274; *Hagar* v. *Reclamation Dist. No.* 108, 111 U. S. 701; *Ochoa* v. *Hernandez*, 230 U. S. 139; *Scott* v. *McNeal*, 154 U. S. 34, and innumerable other cases. The creditors in this case had neither. They were not made parties to the suit, and had no notice of its pendency. Yet the decision of the Supreme Court of Arkansas destroys their only means of collecting their debt

because of a decree to which they were not parties and of which they had no notice.

Moreover, the case of *Fish* v. *Kersh Lake Drainage District* which the Supreme Court held to be conclusive upon the creditors holding judgments in the Federal Court, was obviously collusive as a matter of law. The greatest beneficiaries were the Commissioners of the District, who were relieved of assessments upon their lands amounting to $29,789.46. They were the defendants in the suit. They filed no answer and made no defense; yet the chancellor relieved them and all other landowners, who had paid an amount equal to their assessment of benefits without interest, of all further liability. The case should have been appealed to the Supreme Court, which had many times held that statutes providing for interest upon assessments of benefits were valid, and which would certainly have reversed the decision.

The cases in which the Supreme Court of Arkansas had upheld the validity of statutes making assessments of benefits bear interest, decided prior to the decrees in the injunction suits of 1931 and 1932, and the year of the rendition of the decisions are as follows:

Oliver v. *Whittaker*, 122 Ark. 291, (1916); *Jones* v. *Fletcher*, 132 Ark. 328, (1918); *Skillern v. White River Levee District*, 139 Ark. 4, (1919); *Phillips v. Tyronza Imp. Dist.*, 145 Ark. 487, (1920); *Pfeiffer* v. *Bertig*, 141 Ark. 531, (1920); *Summers* v. *Cole*, 144 Ark. 494, (1920); *Delinquent Lands v. Cache River Dr. Dist.*, 158 Ark. 581, (1923); and *Chicago Mill & Lumber Co.* v. *Drainage Dist. No. 17*, 172 Ark. 1059, (1927).

In the cases of *Skillern* v. *White River Levee District*, 139 Ark. 4, and *Chicago Mill & Lumber Co.* v. *Drainage Dist. No.* 17, 172 Ark. 1059, just cited, the statutes making the assessments of benefits bear interest were passed after the Districts had issued their bonds and done a part of their work.

The same rule has recently been laid down in the case of *Benton* v. *Nowlin*, 187 Ark. 738, where on page 744, the court gave the reason for the rule as follows:

> "The interest on deferred payment of assessments however is no part of the original cost of improvement, but is a legitimate charge for the use of the money of which the appellants have received the benefit. They might have paid the assessment of benefits against their property in cash and so avoided the payment of any interest which might be imposed. On this theory, the general rule has been formulated that the Legislature may authorize the collection of interest on postponed installments of assessments. In the case of *Oliver* v. *Whittaker*, 122 Ark. 291, 183 S. W. 261, it is stated, in effect, that the value of benefits must be fixed at the time they accrue to the property from the construction of the improvement, but interest on the deferred installments becomes also a part, as it accrues, of the benefits, and payment thereof may be exacted. In that connection, the court said: 'All the authorities which are brought to our attention seem to agree that the Legislature may authorize the collection of interest on postponed payments of assessments.'"

A collusive decree binds no one. It is not the act of the court, but merely a fraud upon the court. *Calhoun* v. *Delhi & M. R. Co.*, 121 N. Y. 69; *Craig* v. *Town of Andes*, 93 N. Y. 405; *Andes* v. *Ely*, 158 U. S. 312; *Central Trust Co.* v. *Bridges*, 57 Fed. 753, decided by Chief Justice Taft when circuit judge; *Martin* v. *Wilson*, 120 Fed. 202, decided

by the Circuit Court of Appeals of the Seventh Circuit; *Schulte* v. *Board of Commissioners*, 119 Okla. 261; *In Re Gypsy Oil Company*, 141 Okla. 291; *May* v. *Roberts*, 133 Oregon 643; *Wolff* v. *New Orleans*, 103 U. S. 358; *Hale* v. *Finch*, 104 U. S. 261; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 39; *Empire* v. *Darlington*, 101 U. S. 88; *Brooklyn* v. *Insurance Co.* 99 U. S. 362.

The decree in the Federal Court rendered in 1936 was *res judicata*, and would have superseded the decrees in the State Court rendered in 1931 and 1932 even if they had been valid. In matters of *res judicata* it is always the last judgment which controls. *Horse Creek Coal Land Co.* v. *Alderson*, 266 Fed. 477, decided by the Circuit Court of Appeals of the Fourth Circuit; *California Bank* v. *Traeger*, 215 Calif. 346; *Sipple* v. *Catron*, 205 Ky. 81; *South* v. *Back*, 108 S. W. 230; *Cummins* v. *Mullins*, 183 Ky. 666; *Re McNeil's Estate*, 155 Calif. 333.

OPINION OF THE SUPREME COURT OF ARKANSAS

It appears that the opinion of the Supreme Court of Arkansas in this case was based on *United States* v. *County of Macon*, 99 U. S. 582, and *Arkansas, Ex. Rel. Utley, Attorney General, for the Use of Craighead County* v. *St. Louis San Francisco Railway Company et al.*, 269 U. S. 172.

The first case holds only that the Federal court had no authority by mandamus to compel the collection of a tax which the law did not authorize. Here the laws of Arkansas do authorize interest on the assessment of benefits, and the District Court had so held in the decree in which the mandatory injunction was issued. Moreover, the tax of

6½% per annum had been duly levied by the Jefferson Circuit Court, to run until the last of the certificates of indebtedness had been paid in full. (See Finding of Federal Court, R. 20, 21)

In the second case the Maccabees recovered judgment against Craighead County in the Federal Court and got a mandamus, directing the County to assess its property at full value until the judgment was paid. Thereupon, the County Officers made two assessments; one at full value for the County general tax out of which the judgment was to be paid; but as to all other taxes, it made an assessment at fifty cents on the dollar. The Supreme Court of Arkansas properly held that there was no law for such an assessment, that there could be only one assessment, and that that must be uniform throughout the County for all purposes. It did not deny the validity of the mandamus of the Federal Court. It merely said that the State Officers had not obeyed it, and had not made such an assessment as it required. Under these circumstances, this court merely held that the decision of the Supreme Court of Arkansas did not conflict with the judgment of the Federal Court, and dismissed the writ of error for want of jurisdiction, saying on page 176:

> "In that situation we do not find any basis for the contention that the authority of the judgment of the District Court was denied or its validity questioned by the determination of the state court that the assessment as made within the county was invalid. The mandamus not having prescribed the particular method of assessing the tax, the state court was left free to determine whether the assessment was made according to law, and in so doing it did not determine any matter which had been adjudicated by the District Court or refuse to give full effect to its judgment."

We can see nothing in that case which justifies the opinion of the Supreme Court of Arkansas in the present case. There the State court determined a matter that had not been adjudicated by the Federal Court. Here there had been litigated in the Federal court the question of whether the assessed benefits bore interest at six per cent, and the Federal court had determined that they did; and the Supreme Court of Arkansas failed to give the Federal court's decree full faith and effect.

We pray the Court to read the dissenting opinion filed by Justice Smith and concurred in by Justices McHaney and Baker, and which is interesting as showing the disastrous results that might follow an affirmance of the decision of the court below. (R. 65).

BENEFITS INSUFFICIENT IF DECREES IN LINCOLN CHANCERY COURT ARE PERMITTED TO STAND

In the court below counsel asserted that $100,000 of benefits remained unimpaired by the decrees in the Lincoln Chancery Court; but the statement (R. 41) of their own witness, Victor Felly, stands uncontradicted, and shows that the total uncollected benefits amount only to $52,119.40. The judgment recovered by the Bank is $54,655 with interest at 6% per annum from November 1, 1935, until paid. The judgment of Mrs. Lillian Iddings is for $7,616.40 with interest at the same rate from December 22, 1936, until paid. Therefore, the total amount of the judgments with interest to March 4, 1940, rendered by the Federal court exceeds by $25,807.93 the total uncollected benefits. No doubt many persons paid their drainage taxes upon lands of little value and later allowed them to forfeit. Lands which are so worthless that their owners do not consider them worth the drainage taxes would be of no benefit to the creditors.

Then we submit that the judgment creditors are entitled to the advantages and security of the full assessment of benefits, which make it certain that their judgments will be paid. Moreover, the judgment creditors have no priority over other creditors, and there is nothing in the record to show that the District may not be indebted to persons other than the Bank and Mrs. Iddings.

Finally, even if the contention made by counsel for the respondent were correct, it would not constitute an answer to the petitioners' position that the judgment of the Fed-

eral court is entitled to full faith and credit. In the case of *State Bank & Trust Company* v. *Kersh Lake Drainage District*, (R. 32) the District pleaded in its answer that it had been enjoined by the Lincoln Chancery Court from collecting assessments against the lands involved in the *Johnson* and *Fish* cases. In spite of that plea, the Federal court ordered that an assessment be levied and collected upon every tract of land in the District. The plain effect of that judgment was to overrule the plea made by the District, which we have heretofore shown to be binding upon all property owners in the District, and to decide the matter in favor of these petitioners. The question is, therefore, foreclosed by the operation of the doctrine of *res judicata*, and it is no longer of the slightest importance that there might possibly be other sources for the collection of the judgment entered by the Federal court.

Respectfully submitted,

GEORGE B. ROSE,

Counsel for Petitioners.

APPENDIX

APPLICABLE ARKANSAS STATUTES
POPE'S DIGEST

Sec. 4484. BONDS SECURED BY LIENS—ENFORCEMENT. All bonds issued by commissioners under the terms of this act shall be secured by a lien on all lands, railroads and tramroads in the district, and the board of directors shall see to it that a tax is levied annually, and collected under the provisions of this bill, so long as it may be necessary to pay any bond issued or obligation contracted under its authority; and the making of said assessment or levy and collection may be enforced by mandamus.

If any bond or interest coupon on any bond issued by said board is not paid within thirty days after its maturity, it shall be the duty of the chancery court of the proper county, on the application of any holder of such bond or interest coupon so overdue, to appoint a receiver to collect the taxes aforesaid; and the proceeds of such taxes and collections shall be applied, after payment of costs, first to overdue interest, and then to payment pro rata of all bonds issued by the said board which are then due and payable; and the said receiver may be directed by suit to foreclose the lien of said taxes on said lands; and the suits, so brought by the receiver, shall be conducted in all matters as suits by the board, as hereinbefore provided, and with like effect; and the decrees and deeds herein shall have the same presumptions in their favor; provided, however, that when all such sums have been paid, the receiver shall be discharged, and the affairs of the district conducted by the board of directors of said district as hereinbefore provided. (General Drainage Act of 1909, Sec. 25).

Sec. 4494. INTEREST INCLUDED IN TAX-MODE OF PAYMENT OF ASSESSMENT. The amount of interest which will accrue on bonds issued by such districts and subdistricts shall be included and added to the tax, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the cost of construction in determining whether or not the expenses and costs of making said improvements are or are not equal to or in excess of the benefits assessed.

When assessments of benefits are made in drainage and other improvement districts, the landowners shall have the privilege of paying the same in full within thirty days after the assessment becomes final. But all such assessments shall be made payable in installments (a), so that not more than twenty-five per cent shall be collectible in any one year against the wishes of the landowner, and, in the event that any landowner avails himself of this indulgence, *the deferred installments of the assessed benefits shall bear interest at the rate of six per cent per annum, and shall be payable only in installments as levied. The levy of the assessment may be made by way of proportional amounts of the total assessed benefits, and interest need not be calculated until it is necessary to do so to avoid exceeding the total amount of benefits and interest.* (Italics ours.) (Act 177 of 1913, Sec. 10, page 746).

ACT 467 OF 1919

GENERAL ACTS OF 1919, PAGE 343

An Act Permitting Deferred Payments of Assessments in Drainage Districts.

Be It Enacted by the General Assembly of the State of Arkansas

Section 1. Where assessments of benefits have been made in drainage districts organized either under general or

special acts, the property owner shall have the right to pay such assessments in full within sixty days after the passage of this Act, but if he does not avail himself of this privilege, *the assessment of benefits shall bear interest at the rate of six (6%) per cent per annum,* and shall be payable only in installments as levied. The interest need not be computed until necessary to be sure that the collections have not exceeded the total amount of benefits and interest or the interest may be first collected. (Italics ours.)

Approved March 28, 1919.

ACT 46 OF 1933

Page 126

An Act to Regulate the Collection of Improvement District Taxes

Whereas, abuses are prevalent in receiverships of levee, drainage and road districts; in the allowance of excessive fees to counsel for filing suits for receivers, the allowance of excessive fees to receivers, the appointment of unnecessary attorneys for receivers and the allowance of excessive fees to them, all of which imposes an additional financial burden on the landowners of the district, and

Whereas, the collection officers provided by law can collect improvement district taxes more expeditiously and at less expense than receivers, if they are made to discharge their duties; now, therefore,

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by

a mandamus, or by a mandatory injunction in equity, at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes.

Approved February 18, 1933.

FILE COPY

E. R. CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT ET AL.....*Petitioners*

v. No. 595

A. J. JOHNSON.....*Respondent*

BRIEF FOR PETITIONERS IN REPLY

GEORGE B. ROSE,
Counsel for Petitioners.

PARAGON PRINTING CO., LITTLE ROCK

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In quoting from the decree of the Federal Court on p. 6 counsel do not refer to this portion:

> *And the said Commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes.*

A person reading only the brief of the respondent would suppose that the suit was brought by the Commissioners in the ordinary course of their duties, and not as receivers of the Federal Court.

Counsel make no reference to the case of *Dickinson* v. *Mingea*, 191 Ark. 946, or to the case of *Rogers Paving Improvement District* v. *Swafford*, 193 Ark. 260, where it was held that if any debt of the District is in default for thirty days any creditors may have a mandatory injunction or a mandamus compelling the commissioners of the District to act as receivers of the Court.

Counsel cite casually the case of *Howard-Sevier Road Improvement Dist.* v. *Hunt*, 166 Ark. 62; but they do not undertake to explain away the plain language used in that case. There the Federal Court had rendered a judgment against the District for $380,000, and the Court said on page 71:

> "The District in that case represented the taxpayers, and they were bound by the judgment of the Federal Court."

They ignore entirely the language of the decision in that case which appears on page 72:

> "*As the district represented the taxpayers, it was bound to plead for them any defense that could have been set up* which would have rendered the bonds invalid, and a good defense would have been that, for any reason whatsoever, there was no valid assessment of benefits. *The district could, and should, have pleaded such defense for the benefit of the taxpayers.*"

In obedience to that command, when suit was brought in the Federal Court the District filed an answer (R. 32) in which it set up the decree in the case of *Fish* v. *Kersh Lake Drainage District* as *res judicata*. This defense was overruled by the District Court, and its decree was in all respects affirmed by the Circuit Court of Appeals. So far as we can see, that is an absolute answer to the contention of respondent that the decree in the Fish case is a bar.

From the statement of Johnson, appearing on page 9, it might be inferred that Johnson had paid his entire debt, when in fact, both the complaint and decree in his case showed that he had paid only $1628.00 upon a debt of $1600 bearing interest at six per cent per annum for twenty years. The same facts appear in the Fish case. The report of the auditor (R. 10) shows the amount of each original assessment on each tract of land, and if the amount of this original assessment had been paid on any tract, it was wiped off the assessment book.

On page 11, counsel say that the only question involved in the case in the Federal Court was the right to compel the District to bring suit for the collection of the delinquent taxes. Three questions were presented in that case: First, did the benefits bear interest? Second, was the decree in the Fish case *res judicata?* Third, should the commissioners of the District he required to act as receivers of the Federal Court?

All these questions were decided in favor of the plaintiff, and the decree of the District Court was affirmed by the Circuit Court of Appeals.

Counsel say on page 12 that the decree of the Federal Court left individual taxpayers free to interpose any defense they desired. This is not true. As was decided in *Howard-Sevier Road Improvement Dist.* v. *Hunt,* 166 Ark. 62, all the taxpayers were bound by the decree in the Federal Court. Of course, if a taxpayer had a defense which was entirely peculiar to him and not affected by that decree, he could set it up. For example, he could set up that he had paid his entire assessment with six per

cent interest from the date of the passage of the acts of 1913 or 1919, or he might have shown that his land was not within the bounds of the District and had been assessed by mistake; but the defenses that the assessment of benefits did not bear interest, and that the decrees in the Lincoln Chancery Court were bars to the action for the collection of the assessments brought by the Commissioners as receivers of the Federal Court were entirely precluded by the decision there. Both defenses had been put in issue, and both had been ruled against the inhabitants of the District, who were represented by the Commissioners. If every landowner were allowed to set up the defenses which the District had pleaded in the Federal Court there would be no end to litigation, and no improvement district would ever be able to sell a bond.

Counsel say on page 18 that the holders of judgments in the Federal Court were not injured because the only proper persons in the suit in the Lincoln Chancery Court were the taxpayers on the one side and the District on the other. There might have been some plausibility in that argument if the commissioners had instituted a suit for the collection of the taxes and had conducted it in good faith and the taxpayers defended it. The decrees in the Lincoln Chancery Court, which are pleaded as *res judicata*, were not suits for the collection of taxes. They were suits for injunction, brought by three taxpayers, whose lands were of insignificant extent, as will appear by reference to the audit beginning on page 10. No other taxpayer complained, no other taxpayers were parties to the suits; but in these suits, lands on which the assessments aggregated $197,630 belonging to 102 property owners, were relieved of the burden of assessment.

On page 18, counsel say that it must be presumed that the State Bank & Trust Company of Wellston knew of the suits for injunction brought in the Lincoln Chancery Court. Of course no such presumption can be indulged. It does not even appear that at that time the Bank was a creditor of the District. At the time of taking the judgment in 1935 it held a large number of the certificates of indebtedness, but these may have all been acquired in the interval between 1932 and the date of the judgment.

Counsel, on page 19, refer to the case of *Barkley* v. *Levee Commissioners*, 93 U. S. 258. That case only holds that where a levee district has been abolished and has no officers, there is no one against whom a mandamus can run. We fail to see its application to the case at bar.

On page 21, counsel say that State and Federal Courts are entirely independent of one another, and that nothing done in one court can affect what the other court should do. However, it must be admitted that the decree of either is *res judicata* and can be pleaded in a subsequent suit involving the same matter in the other court. That was exactly what was done in this case. The District pleaded the decree of the Lincoln Chancery Court of 1932 as *res judicata*, as a bar to the suit in the Federal Court where the plea was overruled.

Counsel say, on page 26, that the Federal Court did not attempt to decide the liability of the individual tracts of land. The decree of the Federal Court directs the officers to "extend the taxes against *each tract of land, railroad and tramroad in the District.*" It had overruled the plea that the assessment did not bear interest and its decision was *res judicata*. The Supreme Court of Arkansas, however,

treats it as nothing at all, and thereby denies to it all faith and credit.

Counsel say (page 28) that the statement of Felley is not clear; but it was introduced by the defendants, and sofar as we can see it is perfectly clear. Counsel say that it shows delinquent benefits of $39,899.30, and assessed benefits unpaid of $52,119.40, making a total of $92,018.70. It is apparent that the $39,899.30 of delinquent benefits are included in the $52,119.40 of assessed benefits. If they were not assessed they could not be delinquent, and if they were delinquent they were still assessed benefits unpaid.

Our contention that unpaid assessed benefits of $52,119.40 include the delinquent benefits of $39,899.30 is supported by an analysis of the statement which was filed by Mr. Felly. In order to arrive at the unpaid assessed benefits, the witness very evidently deducted the taxes levied to date ($308,655.65) from the total assessed benefits ($310,543.85), resulting in a difference of $1,878.20. His statement shows that there were delinquent taxes of $39,899.30, and that there were overpaid assessed benefits of $10,351.90. These three items were then added as follows:

Assessed Benefits for which no taxes had been levied	$ 1,878.20
Delinquent taxes	39,899.30
Assessed benefits overpaid	10,351.90
Total	$52,129.40

This total is the identical figure given by the witness for assessed benefits unpaid, except for an error of exactly $10.00, which doubtless resulted from a mistake in copying

one digit of one of the numbers. Therefore, the item of delinquent taxes is included in the item of the assessed benefits unpaid, and counsel for respondent (p. 28) are in error in their statement.

It is evident that if the lands released by the decrees of 1931 and 1932 are not to be charged with interest upon their assessments, the creditors of the District will be unable to collect their judgments.

Counsel say that the decree of the Federal Court only established the amount of the indebtedness. Counsel overlook the fact that there were two decrees. The amount of the indebtedness was settled in the first suit of *Kersh Lake Drainage Dist.* v. *State Bank & Trust Company of Wellston*, 85 Fed. (2d) 643. The second suit, which appears in 92 Fed. (2d) 783, was a suit based upon the original decree and brought for the purpose of having the Commissioners made the receivers of the Federal Court as authorized by the State statute and decisions, and for compelling them to bring suit as such receivers for the collection of the delinquent taxes. In the first suit nothing was decided except the amount of the indebtedness. In the second, the three issues of which we have spoken were presented, and decided, and the decree affirmed by the Circuit Court of Appeals.

Respectfully submitted,

GEORGE B. ROSE,

Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KEISER LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS ..... *Petitioner*

v. No. 595

A. J. JOHNSON ..... *Respondent*

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

CHARLES T. COLEMAN
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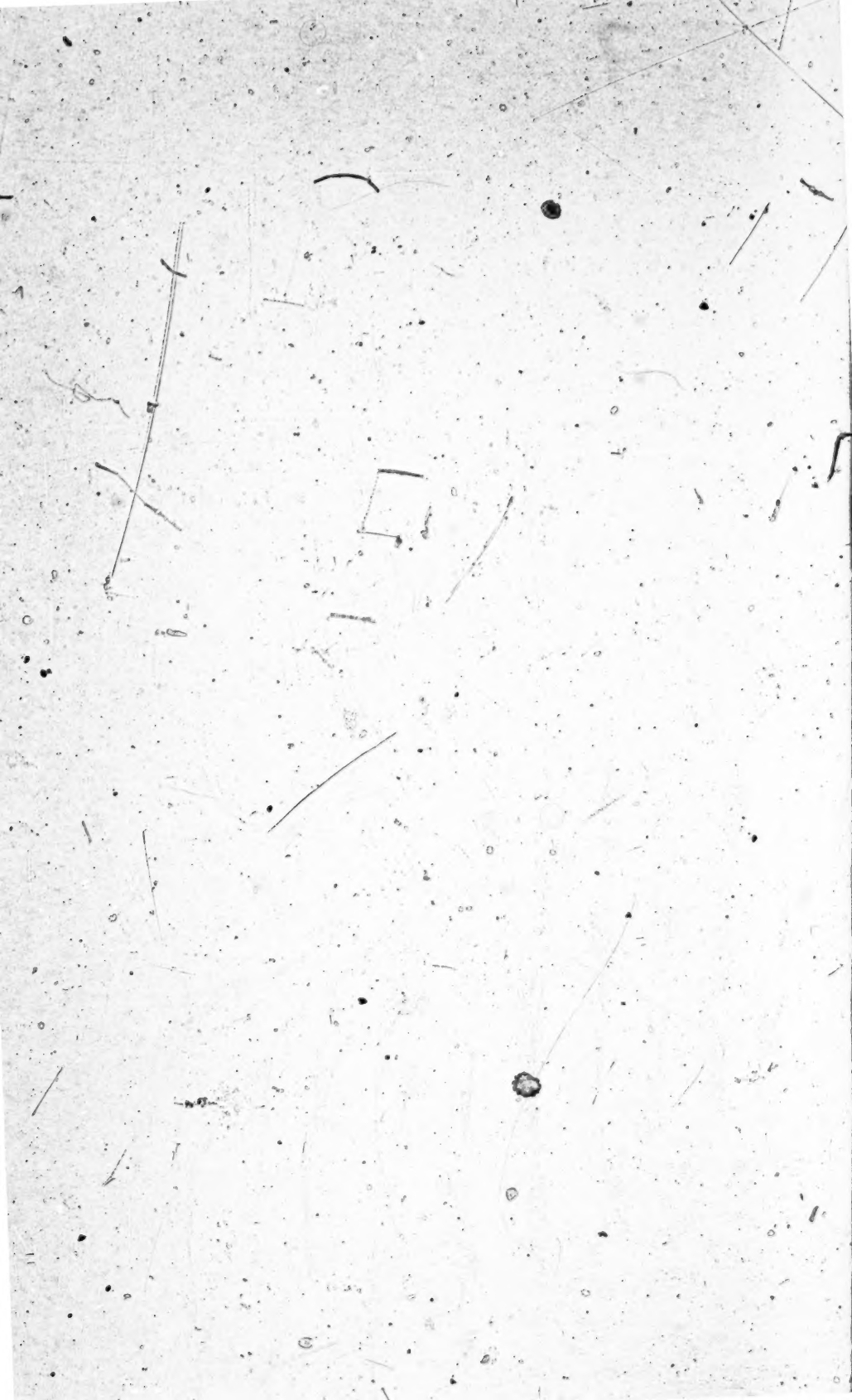
Counsel for Respondent

PARAGON PRINTING CO., LITTLE ROCK



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS.....*Petitioner*

v. No. 595

A. J. JOHNSON.....*Respondent*

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

STATEMENT OF THE CASE

None of the federal questions stated in the petition is involved in this case.

In Arkansas delinquent taxes levied upon benefits assessed upon land to defray the cost of a public improvement are collected by the commissioners of the improvement district by a suit in the state chancery court having jurisdiction of the district. The suit is by the district against the delinquent landowners for a foreclosure of the lien of the taxes. No other court has jurisdiction of the suit and no creditor or bondholder of the district is a proper party.

Pope's Digest of the Statutes of Arkansas, section 4482, printed in the appendix, page 15.

The duty of the commissioners of the district to levy and collect taxes may be enforced by mandamus or a mandatory injunction in equity at the instance of any landowner, bondholder or creditor of the district.

Act 46, page 126, Acts of Arkansas, 1933, printed in the appendix, page 15.

The only question in this case and the only question decided by the Supreme Court of Arkansas in its opinion sought to be reviewed here is whether, in a suit to collect alleged delinquent taxes brought by an improvement district in the state chancery court in obedience to a mandatory injunction issued by a federal district court on the complaint of a creditor of the district, a taxpayer may defend on grounds purely personal to himself; in this particular instance, payment in full of the tax sued for. Counsel for petitioner contends that the taxpayer, in the circumstances stated, may not make such a defense and professes to find in the decision of the Supreme Court of Arkansas, which permitted and sustained such a defense, a denial of full faith and credit to the judgment of the federal district court commanding the bringing of the suit by the district in the state chancery court; and also the taking without due process, of the property, not of the petitioner here, but of others not parties to this suit, namely, the creditors of the district which secured the order of the federal court commanding the institution of the suit in the state court.

The defense of full payment offered by the taxpayer was supported by a final decree of the state chancery court, sustaining that defense, entered years before the institution of the present suit. This decree, rendered by

the only court having jurisdiction of the parties and of the question in litigation, in a suit between the same district and the same taxpayer involving the same tax sued for here, was pleaded by the taxpayer as *res judicata* in the present suit. Nothing is said in the petition about the full faith and credit to which this state court decree is entitled, nor about the taking of the taxpayer's property without due process if, as petitioner contends here, he may not be permitted to defend a suit to recover a tax on the ground that the tax has been paid. Nor, for that matter, does it appear from the petition why it was either necessary or proper for the federal court to order the suit for delinquent taxes brought in the state court if the taxpayers sued were not entitled to defend.

The material facts are as follows:

On December 22, 1936 (Rec. 22) in the suit of State Bank & Trust Company of Wellston, Missouri, plaintiff, v. Kersh Lake Drainage District et al., defendants, the United States District Court for the Eastern District of Arkansas entered its decree (Rec. 17-22) for a mandatory injunction ordering the commissioners of the defendant district to institute suits "for the collection of all delinquent taxes of said district." (Rec. 22). Nothing more was decided. This decree was entered upon a complaint filed by the State Bank & Trust Company of Wellston against the defendant district (Rec. 26-28), alleging that the bank was the holder of an unpaid judgment against the district and praying that the district be compelled under Act No. 46, Acts of Arkansas, 1933, to proceed with the collection of delinquent taxes for the payment of the judgment (Rec. 28).

Counsel for the State Bank & Trust Company of Wellston in this case (Rec. 28) appears as counsel for the petitioner district here.

In obedience to the order of the federal court the drainage district brought this suit in the proper state chancery court against the lands alleged to be delinquent in the payment of taxes (Rec. 1-3) proceeding under section 4482 of Pope's Digest of the laws of the State of Arkansas. In this suit respondent A. J. Johnson answered (Rec. 3) alleging the payment in full of all taxes lawfully levied upon his lands by the district (Rec. 5) and pleading, as *res judicata* of the issue tendered, a decree made in October 1931, by the state chancery court having jurisdiction of such suits, wherein it was determined that the said Johnson had paid to the district all assessments and taxes for which he was legally liable. In this decree of the state chancery court (Rec. 6-8) the court found that respondent Johnson had fully paid and satisfied all benefits and taxes legally collectible from his land by the district (Rec. 7); that the district was attempting to collect further taxes (Rec. 7) and enjoined the district from extending further taxes against said Johnson's lands. Respondent Johnson also pleaded on behalf of other landowners a decree of the state chancery court entered on the 15th day of June, 1932, in which it was found that a number of landowners in the district had likewise paid all taxes and benefits for which they were liable to the district and which enjoined further suits by the district to collect more taxes from these landowners. (Rec. 8-9). On May 29, 1939, the Supreme Court of Arkansas sustained respondent Johnson's defense and his right to make it in the suit brought by the district in obedience to the mandatory injunction of the federal court.

The opinion of the Supreme Court of Arkansas appears in the record at pages 47 to 56. In the opinion the court said:

> "Appellants (respondents here) are not attempting to set up a class defense or one that is common to all the landowners in the district; they are asserting a defense which is peculiar to themselves alone, based on the decrees of the state court which perpetually enjoin the district from collecting any more taxes on these lands. We hold that the decrees are *res judicata*, and we do not think it material in the present case whether the decrees of the state court were right or wrong, there being no allegation of fraud or want of jurisdiction. No appeals were taken from them. The Supreme Court of the United States in *Jeter* v. *Hewitt*, 22 How. 352, said: '*Res judicata* renders white that which is black, and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum.*' The decrees in these suits rendered in 1931 and 1932, *supra*, could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals (fol. 136) were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record."

BRIEF

I

The Decision of the Supreme Court of Arkansas Does Not Deny Full Faith and Credit to the Judgment of the Federal Court Nor Prevent Its Enforcement.

In the suit in the federal court against the district by the State Bank & Trust Company of Wellston for a judgment for the amount of delinquent certificates of the district held by the bank the district represented its taxpayers as a class. The taxpayers were bound by the judgment of the federal court in favor of the bank. No taxpayer could thereafter call the judgment in question in another court and none has.

In the suit in the federal court between the bank and the district for the mandatory injunction in aid of the bank's judgment, the district again represented its taxpayers as a class and the taxpayers cannot and do not in the present case question the validity of the federal court's order directing the district to bring suit for the collection of delinquent taxes.

But the district did not, in either suit in the federal court, represent its taxpayers as individuals, with respect to rights peculiar and personal to each individual taxpayer and adverse to the rights of the district.

The federal court in the suit last mentioned had jurisdition to compel the district on the complaint of the bank to proceed with suits in the state court to collect the delinquent taxes owing to the district by the taxpayers as a class. It did not have and could not have jurisdiction of a

controversy between an Arkansas improvement district and a resident taxpayer of the district as to the amount of taxes delinquent and owing to the district by the taxpayer. The federal court did not attempt to exercise jurisdiction of such a controversy as the one last stated, which is the controversy involved here. All the federal court did was to order the district commissioners to bring a suit "for the collection of all delinquent taxes of said district" in the only court having jurisdiction of such a suit. All that it was necessary or proper for the federal court to decide was that there were delinquent taxes owing to the district which the plaintiff judgment holder was entitled to have collected and applied on its judgment and that is all the court decided.

The taxpayers in the district, as individuals having individual rights as against the district, were not parties to the suit in the federal court and could not have been parties in their individual capacities.

Normandy Beach Development Company v. *United States*, 69 Fed. (2nd) 105, 106.

Ocean Beach Heights v. *Brown-Crummer Company*, 302 U. S. 614; 58 Sup. Ct. 385.

Rork v. *Smith*, 12 N. W. (Wis.) 408.

Each taxpayer, however, as an individual having, with respect to taxes claimed against him by the district, rights adverse to the district was entitled to have his day in court upon the question not only of the validity of the tax assessed against him individually but also upon the question of the amount of any valid tax owing by him to the district. The very purpose of the order of the federal court was to present to a court of competent jurisdiction all questions of this character which might arise between the district and

its taxpayers. This was pointed out in the opinion of the Supreme Court of Arkansas as follows:

> "Each taxpayer was entitled to be heard not only upon the validity of the tax levied but also upon the amount of the tax. The mere fact alone that the federal court directed the appellee district to bring the present suit in the state court was a recognition by the federal court of the power of the state court to decide the issues involved." (Rec. 53).

The only power that the federal court had in the suit in which the mandatory injunction was awarded was the power to compel the district to proceed with the collection of delinquent taxes. If either the benefits which could be legally assessed or the taxes which could be lawfully levied on the benefits assessed were insufficient in amount to discharge the judgment held by the bank against the district, the federal court was wholly without power to increase either; or to set aside past judgments of a state court of equal dignity entered in suits between the district and an individual taxpayer determining the issues raised on the amount and legality of an individual assessment in favor of the taxpayer. Needless to say the federal court did not attempt to exercise such jurisdiction and the opinion of the Arkansas Supreme Court in this case sustaining the right of the individual taxpayer to defend the suit brought against him by the district in obedience to the order of the federal court does not deny to either judgment of the federal court the full faith and credit to which it is entitled.

In awarding a mandamus or a mandatory injunction in aid of its judgment a federal court neither creates new rights nor confers new powers. All it does is to bring existing powers into operation.

United States v. *County of Macon*, 99 U. S. 581, 591 and 592.

When an existing power is thus brought into operation the party against whom the power is caused to move has the absolute right to defend against any attempted excessive, illegal or arbitrary exercise of it.

Rees v. *City of Watertown*, 86 U. S. 107, 122.

State of Arkansas v. *St. Louis-San Francisco Railway Company*, 269 U. S. 172; 46 Sup. Ct. 66, 67.

Chandler, Receiver, v. *Peketz*, 297 U. S. 609; 56 Sup. Ct. 602, 603 and 604.

In the case last cited, which is relied on by petitioner, a federal court entered a judgment ordering an assessment against stockholders of a corporation in receivership. A suit was brought by the receiver on this judgment in a state court to collect the assessment. This court held that the judgment of the federal court was not subject to collateral attack by the stockholder in the suit in the state court, but it was careful to point out that in defense of the suit the stockholder was not precluded from asserting any defense personal to himself, such as that he was not a stockholder or had a claim against the corporation which he was entitled to set-off against the assessment or that the amount of the assessment levied against him pursuant to the federal court order was not correct.

In the present case respondent does not question the validity nor the effect of any judgment entered by the federal court but, when sued by the district in obedience to the order of the federal court for a tax alleged to be owing to the district, respondent defends the suit by proving that the tax sued for is not owing and by showing that in a former suit

against him for the same tax the issue has been adjudicated in his favor by a court of competent jurisdiction.

II

The Decision of the Supreme Court of Arkansas Does Not Take the Property of Judgment Creditors of the District Without Due Process.

Counsel for petitioner argues that the decision of the Supreme Court of Arkansas deprives the holders of judgments against the district of their property without due process of law. But no holder of a judgment against the district is a party to this suit. And such a judgment holder might well complain of a denial of due process if his rights were determined in this suit to which he is not a party. Importance is attached to the fact that judgment creditors were not parties to the suit between the district and respondent in the state chancery court in 1931, while none is seen in the fact that no judgment creditor is a party here. The absence of judgment creditors from the proceeding in the state court does not affect the validity of the judgment of that court as between the petitioner district and the respondent taxpayer. It is the validity of the judgment as it affects these parties that is involved in this proceeding.

In Arkansas taxes levied on benefits in improvement districts are limited by the amount of the benefits. Taxation without benefits, or beyond benefits, is confiscation prohibited by the state and federal constitutions.

Alexander v. *Board of Directors Crawford County Levee District*, 97 Ark. 322, 330.
Cribbs v. *Benedict*, 64 Ark. 561.

Under the Arkansas statute creating the petitioner district neither the bondholders nor judgment creditors of the district are proper parties in a suit to collect delinquent taxes. The statute providing for that proceeding requires that the suit be brought by the district. (See statute printed in appendix). The purchaser of the securities of an improvement district is charged with the knowledge of the limits imposed by law upon taxation by the district and of the method provided by law for the collection of taxes by the district. The decree of the federal court awarding the mandatory injunction on the complaint of a judgment creditor of the district shows that the district (Rec. 21) defaulted upon the principal of its bonds in the year 1929. It is certainly not too much to assume that the holders of the district's securities were aware of this default. With this knowledge, it taxes credulity to assume that they did not keep in touch with the proceedings of the district for the collection of taxes upon which the payment of their securities depended. There is nothing in this record to show that they were not advised of the suits.

Nor is it important, if true, that the decrees of the chancery court pleaded as *res judicata* were erroneous. See the opinion in *Chicot County Drainage District* v. *The Baxter State Bank*, decided by this court January 2, 1940. In these state cases the taxpayers contended that they were not liable for further assessment since they had paid the full amount of the benefit then assessed against their property. At the time the cases were tried the Supreme Court of Arkansas had never passed upon the application of the interest statutes of 1913 and 1919 to districts organized prior to the passage of these statutes, petitioner being one of these. Moreover, the court has never yet decided the precise ques-

tion, as pointed out by the Circuit Court of Appeals in its opinion affirming the district court in the mandatory injunction case.

> *Kersh Lake Drainage District* v. *State Bank & Trust Company of Wellston, Missouri*, 92 Fed. (2nd) 783, 786.

To that extent the question as to whether or not respondents were liable for interest is still an open question in the State of Arkansas.

III

The Record Does Not Show Collusion in the Decrees of the State Chancery Court of 1931 *and* 1932. *Nor Does the Record Show that If the Decision Sought to be Reviewed is Sustained the Judgment Holders Will not be Able to Collect Their Judgments against the District.*

In its opinion the Supreme Court of Arkansas said of the decrees in the state chancery court adjudging that respondent had paid all taxes that could be legally levied upon his property:

> "The decrees of these suits rendered in 1931 and 1932 could only have been set aside on appeal or by direct action to annul them on the ground of fraud and as we have said, no appeals were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record."

In this case there is neither allegation in the pleading nor evidence in the record suggesting collusion in the decrees in the state chancery court, nor is there allegation or proof that the holders of judgments obtained in the federal court will not be able to collect their judgments if the de-

cision of the Supreme Court of Arkansas is sustained. Both arguments are advanced in this case, not by any judgment creditor of the district but in the name of the district itself, which was a party to collusion in the state court if any there was. The charge of collusion, like that of want of due process, is made by counsel for petitioner not on behalf of petitioner but for a judgment creditor not a party to the suit. The argument is gratutiously advanced by petitioner not for itself but on behalf of parties absent from the record.

If any judgment creditor has ground for supporting such a charge the way is open under the statutes of Arkansas, as pointed out by the Supreme Court in its opinion quoted above, to bring an action in the state chancery court to annul the decrees on that ground.

CONCLUSION

It is necessary to remember that the federal court in the proceeding for the mandatory injunction was dealing only with delinquent assessments of the district and with the right of the judgment creditor of the district to compel the collection of these assessments and their application to the payment of the creditor's judgment. The court did not, as said by petitioner, direct the commissioners of the district to levy a tax upon every piece of land in the district regardless of whether it was indebted to the district for delinquent taxes and regardless of whether it was subject to further taxes. Such a judgment, if made by the federal court, would have been void as beyond its power to make. All that the federal court did was to order the district to proceed with the collection of those assessments which it

was entitled to collect under the law. In so far as it dealt with the taxpayers of the district and their assessments it dealt with them as a class. It was not concerned in the proceeding before it with rights personal to the individual taxpayer and adverse to the district. That these rights might be determined in the only court having jurisdiction to determine them, made it necessary for the federal court to direct the district to bring this suit in the state court. The fact that an individual taxpayer or a number of taxpayers asserted rights purely personal to themselves in defense of the suit brought by the district in obedience to the judgment of the federal court does not interfere with the enforcement of the federal court's judgment nor deny it full faith and credit under the constitution nor take the property of anyone without due process.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES T. COLEMAN,

WALTER G. RIDDICK,

For Respondent.

Little Rock, Arkansas.

APPENDIX

Section 4482 of Pope's Digest of the Laws of the State of Arkansas, page 1296.

"All taxes levied under the terms of this act shall be payable between the first Monday in January and the 10th day of April of each year; and if any taxes levied by the county court in pursuance to this act are not paid at maturity, the collector shall not embrace such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of twenty-five per cent; and said board of commissioners shall enforce the collection by chancery proceedings in a court of the county in which the lands are situated having chancery jurisdiction; and said court shall give judgment against said lands, railroads or tramroads for the amount of such taxes, and said penalty of twenty-five per cent and interest on same, from the end of said sixty days allowed for the collection thereof, at the rate of six per cent per annum, and all costs of the procedings. * * * "

Act 46 of 1933, Page 126

An Act to Regulate the Collection of Improvement District Taxes.

Whereas, abuses are prevalent in receiverships of levee, drainage and road districts, in the allowance of excessive fees to counsel for filing suits for receivers, the allowance of excessive fees to receivers, the appointment of unnecessary attorneys for receivers and the allowance of excessive fees to them, all of which imposes an additional financial burden on the landowners of the district, and

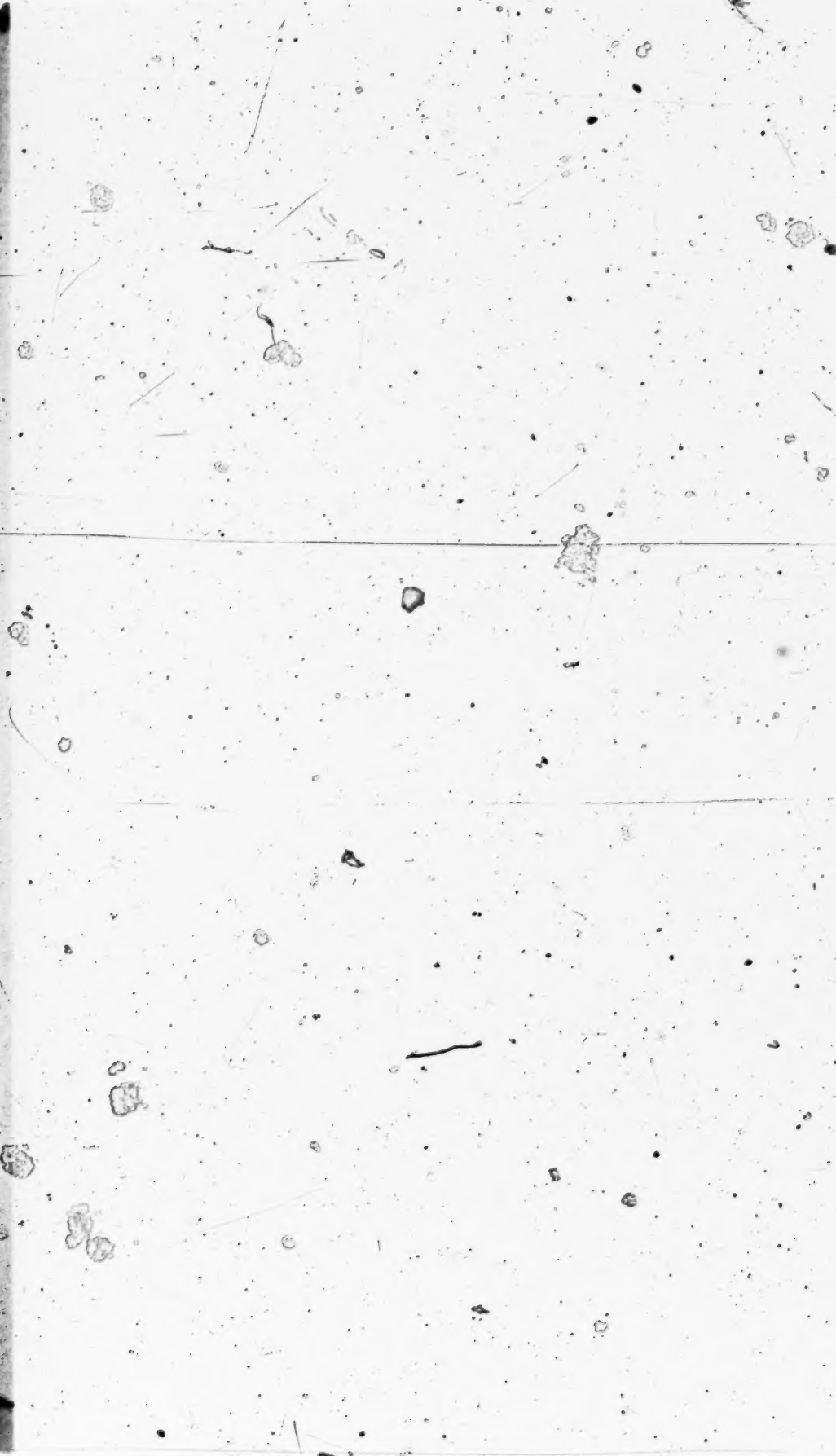
Whereas, the collection officers provided by law can collect improvement district taxes more expeditiously and

at less expense than receivers, if they are made to discharge their duties; now, therefore,

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by a mandamus, or by a mandatory injunction in equity, at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes.

Approved February 18, 1933.



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IN THE

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KERSH LAKE DRAINAGE DISTRICT, ETC., ET AL.....*Petitioners*

v. No. 595

A. J. JOHNSON.....*Respondent*

BRIEF FOR RESPONDENT ON CERTIORARI

CHARLES T. COLEMAN,
WALTER G. RIDDICK,
For Respondent.

PARAGON PRINTING CO., LITTLE ROCK

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OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT, ETC., ET AL.....*Petitioners*

v. No. 595

A. J. JOHNSON.....*Respondent*

STATEMENT OF THE CASE

In the solution of the questions presented in this case it is necessary to understand the relative rights under Arkansas laws of Arkansas drainage districts, the taxpayers in the districts and the creditors of the district, as well as to determine exactly what was involved and what was done, not only in the case before the court but in the other cases in both the state and federal courts in which the district and its bondholders, or the district and its taxpayers, were parties.

The Kersh Lake Drainage District is an Arkansas improvement district organized under the general drainage law of Arkansas. Respondent Johnson is a landowner and taxpayer in the drainage district.

The general law of Arkansas for the organization of drainage districts is contained in Volume 1, chapter 52 of

Pope's Digest of the Statutes of Arkansas, beginning at page 1285,

The commissioners of the district assess the value of the benefit to accrue to each tract of land within the district by reason of the construction of the drainage improvement. The assessment being completed, the court having jurisdiction of the organization proceedings, enters an order providing that there shall be assessed upon the real property of the district a tax sufficient to pay the cost of the improvement "which tax is to be paid by the real property in the district, in proportion to the amount of the assessment of benefits thereon and which is to be paid in annual installments, payable not to exceed twenty-five per cent for any one year as provided in such order."

Collection of the proportion of the benefit annually levied against the land is enforced in the following manner:

> "All taxes levied under the terms of this act shall be payable between the first Monday in January and the 10th day of April of each year; and if any taxes levied by the county court in pursuance to this act are not paid at maturity, the collector shall not embrance such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of twenty-five per cent; and said board of commissioners shall enforce the collection by chancery proceedings in a court of the county in which the lands are situated having chancery jurisdiction; and said court shall give judgment against said lands, railroads or tramroads for the amount of such taxes, and said penalty of twenty-five per cent and interest on same, from the end of said sixty days allowed for the collection thereof, at the rate of six per cent per annum, and all costs of the proceedings. Such judgments shall provide for the

sale of said delinquent lands for cash by a commissioner of the court, after advertisement hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of the said lands be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such lands, and not against any other property or estate of said defendant. All or any part of said delinquent lands, railroads or tramroads for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid; and notice of the pendency of such suit shall be given by publication weekly for four weeks before judgment is entered for the sale of said lands, railroads, or tramroads, in some newspaper published in the county where such suits may be pending.

Section 4482, *Chapter* 52, *Pope's Digest of the Laws of Arkansas, Volume* 1, *page* 1296.

The district bondholder is protected by the following act:

"Section 1. Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by a mandamus, or by a mandatory injunction in equity, at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes."

Act No. 46 *of* 1933, *page* 126.

These acts fix the relative rights, powers and duties of the district, its taxpayers and its creditors. The district sold no bonds but instead issued certificates of indebtedness to the contractor who constructed the improvement in payment for the construction work. Certain of these certificates passed into the hands of the State Bank & Trust Company of Wellston, Missouri, and the district becoming delinquent in their payment, the bank secured in the United States District Court for the Eastern District of Arkansas on the 1st day of November, 1935, a judgment against the district for the amount of its certificates with interest. The bank's judgment being unpaid, it instituted in the same court a suit for a mandatory injunction requiring the commissioners of the district to proceed with the collection of taxes within the district with which to pay the bank's judgment. (Rec. 26-28).

In this cause, the bank, after setting out its judgment and the fact that it was unpaid, alleged the organization of the district under the Act of Arkansas herefore quoted and the assessment of benefits in the district in the amount of $293,191.90. It further alleged that under the applicable acts of Arkansas the benefit assessed bore interest at the rate of six per cent per annum and that a tax at the rate of six and one-half per cent had been duly levied upon the benefits in the district but that the commissioners, claiming that the benefits had been exhausted by collection, had instructed the county clerks of the counties in which the district was located not to extend taxes upon the taxbooks. The bank prayed for a mandatory injunction requiring the county clerks of Jefferson, Lincoln and Desha Counties of Arkansas, who were made parties defendant to extend against the lands in the district the taxes levied by the Jef-

ferson Circuit Court; requiring the collectors of the several counties to collect the tax extended; and requiring the commissioners of the district to institute and prosecute to a conclusion suits to collect all taxes so extended which were unpaid; the extension and collection of the taxes to continue under the injunction sought until an amount sufficient to discharge the plaintiff's judgment had been realized. (Rec. 26-28)

To this complaint the defendant district filed an answer denying each material allegation, asserting that the Jefferson Circuit Court had not provided for the collection of interest upon benefits assessed in the district, averring that the claim for interest upon the assessments was barred by limitation, and alleging that taxes in excess of an amount sufficient to pay the cost of the improvement as determined by the organizing court had been collected. (Rec. 28-29)

This pleading was followed by an amended answer which elaborated the defenses set up in the original, adding that the Act of Arkansas of 1919 providing for interest upon benefits was unconstitutional and void as applied to this particular district.

On December 28, 1936, a decree in this case was entered by the federal court in favor of the bank (Rec. 18-22). In its findings of fact incorporated in the decree, (Rec. 20-21) the court, after finding the organization of the district including lands in Jefferson, Lincoln and Desha Counties, found that benefits in the district had been duly assessed in the amount of $293,191.90 and that certificates of indebtedness amounting to $181,500.00 bearing interest at the rate of six per cent per annum, and negotiable in form, payable

serially through the years 1920 to 1934, had been issued in payment for the construction of the district. (Rec. 20)

The court further found that the Circuit Court of Jefferson County had duly levied a tax upon the benefits assessed at the rate of six and one-half per cent per annum to continue to be paid until the payment of all the district's indebtedness. (Rec. 20)

Under the heading "Declaration of Law" (Sec. 21) the court declared the law as follows:

> "The plaintiff and interveners are entitled to maintain this suit and to a mandatory injunction compelling the defendant commissioners and the defendant county clerks and county collectors to perform their duties in the collection of drainage taxes upon the lands in suit."

Upon these findings of fact and upon the above declaration of law the court ordered that a mandatory injunction issue requiring defendant county clerks "to extend upon the textbooks of their respective counties a tax of six and one-half per cent of the benefits assessed against each tract of land in the district for each of the years 1936 and the following years until the whole of this decree has been satisfied." (Rec. 21)

The respective county collectors were ordered to collect the tax so extended.

The court further ordered that the commissioners of the district be required "to institute suits for the collection of all delinquent taxes of said district and to prosecute the same with due diligence to a conclusion, and to see that the

delinquent lands are sold promptly under a decree of foreclosure, and that they be required to do all things necessary as commissioners of the said district to insure the prompt collection of the drainage taxes." (Rec. 22)

This decree the district appealed to the Circuit Court of Appeals for the Eighth Circuit where it was affirmed on November 23, 1937. (Rec. 37)

Kersh Lake Drainage District v. *State Bank & Trust Company*, 92 Fed. (2d) 783.

In its opinion the Circuit Court of Appeals stated that the appellant district's contentions were the following:

(1) That the original assessment of benefits in the district had been paid in full and that for this reason no further taxes could be imposed on the lands within the district. (2) That the statutes of Arkansas providing for interest upon benefits assessed have no application to the appellant district because they are not retroactive in effect and to increase assessed benefits by adding interest violates the state and federal constitutions; the statute of limitation. (Opinion, p. 783) Without going into the facts in the record, the court dismissed as groundless the questions raised under the constitution and the statute of limitation and, after considering the laws of Arkansas with reference to interest upon assessments of benefits, decided that such assessments bore interest and that the statutes providing for interest applied alike to districts organized before and after the passage of the statutes.

In obedience to the mandatory injunction of the federal court the clerks of the various counties extended taxes against the lands in their respective counties. And the col-

lectors of the three counties proceeded with the collection of taxes extended. There is nothing in the record to show what resulted in Desha or Jefferson Counties but in Lincoln County respondent Johnson and other taxpayers refused to pay. The commissioners of the district, in obedience to the mandatory injunction of the federal court, following the procedure outlined in such cases by the statutes of Arkansas, instituted a suit for foreclosure of the lands upon which the taxes were claimed to be delinquent. This is the suit now before the court.

The complaint in this case, after alleging the organization of the district, the assessment and levy of taxes therein and the delinquency of certain landowners in the payment of taxes, asked that the amount due upon each tract be declared a lien thereon and that a short time be fixed for its payment and that in the event of failure to pay, the land be sold to satisfy the lien. (Rec. 1 to 3) Respondent Johnson for himself and other landowners similarly situated filed an answer in which he set up his ownership of a certain one hundred and sixty acres sought to be sold for nonpayment of taxes and with respect to the particular tract of land involved alleged that he had paid the total benefits assessed thereon. (Rec. 4 to 5) In support of his allegation that the total benefits assessed against his land had been paid in full, respondent Johnson set up a decree rendered in the Lincoln Chancery Court on the 19th day of October, 1931, in which this contention was sustained in a suit in which Johnson and the drainage district were parties and in which was involved the question of the lability of this particular piece of land to further taxation. He also set up on behalf of other property owners in the district another decree of the same court entered on the 15th

day of June, 1932, in a suit in which other landowners and the drainage district were parties in which it was determined by the court that the full benefit assessed upon these particular lands and their full liability to the district for taxes had been satisfied. (Rec. 5-6)

The decrees referred to were exhibited with the answer and made a part of it. In the decree of October 19, 1931, the court found that Johnson was the owner of the land described; that it was included within the drainage district; that an assessment of benefits had been finally made and confirmed upon this particular tract of land and that the assessment so made and confirmed had been paid in full. It decreed that "the lien of the Kersh Lake Drainage District against the SW¼ of Section 8, Township 9 south, range 5 west by virtue of its assessment of benefits in the sum of $1600.00 is fully satisfied and released, that the tax extended by the commissioners for 1930 collectible in 1931 is without authority and void and the clerk of this court shall satisfy the record of delinquent lands returned to him in 1931 as far as the SW¼ of section 8, township 9 south, range 5 west is concerned, and the defendant commissioners are permanently restrained from extending other or further taxes against the said lands." (Rec. 7-8)

The decree of the 15th day of June, 1932, in the Lincoln Chancery Court involved Lincoln county lands of other taxpayers of the district. From the decree it appears that an audit of the affairs of the district had been made and filed in the case and that from the audit and other evidence submitted, the court found that the lands of the district were not subject to payment of taxes beyond the amount of benefits assessed upon them. It is apparent from the

decree that the audit showed the amount of benefits finally assessed against each tract of land involved and the amount which had been paid by the owner of that tract. The court held that those landowners who had paid the full amount of the benefit assessed against them were no longer subject to taxation and enjoined the district from attempting to collect further taxes of them. A list of these landowners appears in the record from page 10 to 16. It is to be remembered that they are the owners of land in Lincoln County and that the only landowners released were those who had paid the full amount of their tax liability to the district.

There were other pleadings by both parties which did not change the issue, whether the decrees of 1931 and 1932 were *res judicata* of the question presented in the present suit.

On trial of the suit in the Lincoln Chancery Court the decree was in favor of the district and against respondent Johnson. (Rec. 41-46) With respect to the defense interposed by respondent Johnson, the court said:

> "The court finds all the issues against the said A. J. Johnson and other property owners similarly situated which issues were set out in the answer filed by A. J. Johnson and amendments thereto." (Rec. 44)

Johnson appealed to the Supreme Court of Arkansas where the decision of the lower court was reversed, the opinion appearing in the record at pages 47-56. In its opinion (Rec. 53) the Supreme Court of Arkansas said:

> "The object of a writ of mandamus or a mandatory injunction is merely to require public officials to perform an existing duty and courts cannot require

than to do more than the law permits them to do. As was said in *United States* v. *County of Macon*, 99 U. S. 582, 591: 'We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation.' And even though the Federal Court properly rendered the judgment in favor of the certificate holders against the appellee district and properly ordered the officials of the district to collect a tax upon the property of each citizen therein to pay the judgment, nevertheless this order did not deny to appellants and the individual taxpayer in that district the right to set up any defense against the tax assessment that he might have."

In the Arkansas Supreme Court a petition for rehearing was filed by the drainage district in which every point urged before this court was advanced and argued. (Rec. 56-63) The petition was denied (Rec. 63) and certiorari granted by this court.

Respondent makes this detailed statement in order to make clear from a confusing and tedious record the following propositions decisive of the questions raised in this case.

1. In the suit in the federal district court by the Bank of Wellston against the drainage district for a mandatory injunction in aid of its judgment against the district the only question involved was the right of the bank to compel the officers of the district to proceed with the duties charged upon them by law in the collection of the district's taxes and the payment of its debts. The judgment was admitted and the bank's right was beyond question because expressly conferred by the statute of Arkansas relating to such matters and sustained by general principles applicable to such cases. The decision of any other question

was neither necessary nor proper in the case. The federal district court's declaration of law in its decree shows that this was the real question decided.

2. In the suit in the federal district court the district opposed the issue of the mandatory injunction on the ground that there was no property in the district subject to assessment for the payment of the bank's judgment, that is, that the benefits assessed in the district had been fully collected. Conceding, for the argument, that the federal court properly decided this question against the district on the principle that it should not order the collection of taxes on property not in existence, the effect of the decision of the federal district court was not to bind the individual taxpayer in the district upon the question of the amount of unpaid benefit owed by the individual taxpayer to the district, and subject to collection by the district in the suit ordered by the federal district court. This is true because (1) the individual taxpayer was not and could not have been a party to the suit in the federal court, (2) the federal court did not have jurisdiction of a suit against the individual taxpayer and could not have had jurisdiction against the individual taxpayer even if he had been joined as defendant, (3) the amount of individual taxpayers liability to the district was not in question.

3. Included in the question whether there remained unpaid benefits subject to assessment by the district for the payment of the bank's judgment was the related question of whether the principal amount of benefits unpaid bore interest, the bank asserting, and the district denying, the right to interest. This was the question submitted to and decided by the Circuit Court of Appeals. Conceding,

for the argument, that in the suit for a mandatory injunction the federal district court decided the question of interest against the district the effect of the decision was to bind the taxpayers as a class and was not to bind the individual taxpayer on the question of the amount of his liability to the district, either principal or interest, when sued by the district in obedience to the order of the federal district court.

4. In the suit between respondent Johnson and the district in the Lincoln Chancery Court in 1931 the question was the amount of Johnson's individual liability as a taxpayer to the district. The only necessary or proper parties to the suit were Johnson and the district and the Lincoln Chancery Court was the only court with jurisdiction to decide the question involved. The Lincoln Chancery Court, in deciding in favor of Johnson, decided that Johnson had paid the full amount of benefit assessed against him and the full amount which the district had the power to collect from him. These statements are true of the suit in the Lincoln Chancery Court between Johnson and other taxpayers and the district which resulted in the decree of 1932.

5. Neither of the decrees of the Lincoln Chancery Court in 1931 and 1932 was called in question in the federal district court in the proceeding for a mandatory injunction. They could not have been called in question there because neither Johnson nor the other taxpayers were parties. When questioned, as here, in the same Lincoln Chancery Court, in a suit between the district and Johnson and the same taxpayers, for the same assessment, the issue being again on the amount of the liability of the taxpayer to the district, these decrees are, whether right or wrong, *res adjudicata* of the issues in the present suit.

6. The decision of the Arkansas Supreme Court sustaining the decree of the Lincoln Chancery Court of 1931 and 1932 in the present suit, therefore, does not deny full faith and credit to the judgment of the federal district court, nor hinder or prevent its enforcement, nor take property without due process.

SUMMARY OF THE ARGUMENT

I.

The Decision of the Arkansas Court Does Not Take the Property of the Creditors of Petitioner Without Due Process.

Alexander v. *Board of Directors Crawford County Levee Dist.* 97 Ark. 322, 330.

Cribbs v. *Benedict*, 64 Ark. 561.

Kelley Trust Co. v. *Paving District*, 184 Ark. 408.

Protho v. *Williams*, 147 Ark. 535, 536.

II

The Decision of the Supreme Court of Arkansas Does Not Prevent the Enforcement of the Order of the Federal District Court.

Cash v. *St. Louis, S. W. R. Co.* 162 Ark. 859.

Chandler, Rec., v. *Peketz*, 297 U. S. 609, 56 Sup. Ct. 602, 603 and 604.

State v. *St. L. S. F. R. Co.*, 162 Ark. 443, 454.

State v. *St. L. S. F. R. Co.*, 269 U. S. 172; 46 Sup. Ct. 67.

III

The Decision of the Supreme Court of Arkansas Does Not Deny Full Faith and Credit to the Judgment of the Federal Court.

City of Auburndale v. *State* 155 So. (Fla.) 97.

Ex parte Rowland, 104 U. S. 604, 612.

Grand Island R. Co. v. Baker, 45 Pac. 494.

Howard-Sevier Dist. v. *Hunt*, 166 Ark. 62.

In re Assessment Sewer Dist. No. 1, 147 Pac. (Wash.) 199.

Normandy Beach Development Co. v. U. S., 69 Fed. (Mo.) 105.

Northern Pac. R. Co. v. *Snohomish County*, 172 Pac. (Wash.) 878.

Ocean Beach Heights v. *Brown-Crumner Co.*, 302 U. S. 614, 58 Sup. Ct. 355.

Redwood Highland Co. v. *Town of Redwood*, 224 Pac. (Cal.) 780.

Rork v. *Smith*, 12 N. W. (Wis.) 408.

U. S. v. *County of Macon*, 99 U. S. 582, 591.

IV

No Question of Collusion in State Court Decrees Presented.

Chicot Co. Dist. v. *Baxter State Bank*, decided by this Court January 2, 1940.

Jeter v. *Hewitt*, 22 How. 532.

Tri-County District v. *Vincennes Bridge Co.*, 170 Ark. 22.

BRIEF

I

The Decision of the Supreme Court of Arkansas Does Not Deprive the District Creditors of Property Without Due Process.

In Arkansas all improvement taxes are based on benefits and have no other basis or justification. If there is no benefit there can be no tax or assessment. The limit of the benefit is, therefore, the limit of the tax. Taxation without benefits, or beyond benefits, is confiscation. The Arkansas court has always held that any exaction in excess of the special benefit is, to the extent of such excess, the taking of property without compensation and as such prohibited by the constitution.

Alexander v. Board of Directors Crawford County Levee District, 97 Ark. 322, 330.

Cribbs v. Benedict, 64 Ark. 561.

See also:

Kelley Trust Company v. *Paving District*, 184 Ark. 408.

Local Improvement districts like the petitioner here are quasi public corporations of strictly limited powers. The purchaser of the securities of such a district is charged with notice of the limitations provided by the laws under which the district is created. In the present case, the purchaser of the certificates of the petitioner district was charged with the knowledge that the certificates were payable exclusively from assessments levied by the district

upon the special benefits assessed against the various tracts of land in the district. The purchaser was also charged with the knowledge that the limit of these special assessments was the limit of the ability of the district to pay and with the knowledge of the methods provided by the laws governing the district for the collection of the assessments and the payment of the district's certificates.

Among other things, the purchaser was bound to know that these laws provided for the final determination of the amount of benefit legally collectible from any particular tract of land in Lincoln County by the Lincoln Chancery Court and for the decision of the question concerning the existence, amount or legality of the benefit on any particular tract of land in suits between the district and the taxpayer involved, without the presence of the certificate holder and without notice to him. The purchaser of such a certificate is therefore bound by the judgment of the court to which the state law commits such a question for decision, where the case in which the judgment is rendered is fairly conducted according to the forms of law provided.

There is nothing either novel or wrong in this procedure. It is the one followed in Arkansas from time immemorial. The chancery court having jurisdiction of the property involved, has jurisdiction over all suits between the property owner and the district and the power to determine the amount of the benefit on any particular tract as well as to cancel or set aside an illegal assessment of benefits.

Protho v. *Williams*, 147 Ark. 535, 536.

Any other procedure would render impossible the practical operation of the affairs of improvement districts. A

taxpayer could never maintain his right to a just assessment of benefits, in the court of the state having jurisdiction, if in order to obtain a final adjudication of the question he had to bring into the court every bondholder or certificate holder or creditor of the district. In many cases these are numerous. Frequently they are not represented by trustees and generally they do not reside in Arkansas. Rarely are any of them within the jurisdiction of the court or their identities known to the taxpayer or district.

It is, therefore, of no importance that the Bank of Wellston was not a party to the litigation between the district and respondent Johnson and other taxpayers in the Lincoln Chancery Court in 1931 and 1932. The statute creating the district fixes the parties to such a suit and the bank could not have been a party except by intervention on a showing that the District officers were not prosecuting the suit. For that matter, there is nothing in the record in the way of proof to show that the bank was not advised of the litigation since it does appear from the decree of the federal district court in the mandatory injunction suit that the district defaulted upon the payment of its certificates in the year 1929. (Rec. 22) Ordinarily, in such circumstances, the bank would have been in touch with affairs in the district.

In the brief on behalf of petitioner in the present case, much is said about depriving the bank of its property without due process. The Bank of Wellston, however, is not a party on the record to this suit. If the district represents it here so as to advance an argument concerning the taking of its property by the judgment in this suit then to the same

extent the district represented the bank in its suit with with the taxpayers in the state court in 1931 and 1932. Perhaps petitioner proceeds upon the theory that the creditors of the district and not the district are the owners of the liens for taxes, a notion long ago put at rest in *Barkley* v. *Levee Commissioners*, 93 U. S. 258.

II

The Decision of the Supreme Court of Arkansas Does Not Prevent the Enforcement of the Judgment of the Federal District Court in the Mandatory Injunction Case.

The pertinent language of the mandatory injunction is as follows:

> "It is, therefore, considered, ordered and decreed that a mandatory injunction issue requiring the defendant county clerks * * * to extend upon the tax books of their respective counties the tax of 6½ per cent of the benefits assessed against each tract of land * * * in the district for each of the years 1936 and the following years until the whole of this decree has been satisfied." (Rec. 21)

And that the:

> "Commissioners of said district be required to institute suit for the collection of all delinquent taxes of said district and to prosecute the same with due diligence to a conclusion." (Rec. 22)

At the date of the order of the federal district court there were outstanding uncollected benefits in the district in excess of the judgments held against the district. But there were no "benefits assessed" against respondent Johnson's land nor against the lands of those other taxpayers associated with him in the suit in the Lincoln Chancery Court in 1932. Benefits had been assessed against John-

son's land and the lands of the other taxpayers involved in these suits but they had been paid in full and the assessments had been extinguished by payment and by the decrees of the Lincoln Chancery Court sustaining the claim of payment in full in the litigation between respondent and the district. The decree of the federal court did not deal with individual assessments or purport to deal with them. It merely directed the collection of a tax of 6½ per cent of "the benefits assessed against each tract of land." If no benefits were assessed on the tract the order did not require a tax to be collected. If it had, and a tax had been levied, the tax would have been void and could not have been collected.

Cash v. *St. Louis Southwestern R. R. Co.* 169 Ark. 859.

The federal district court had no authority to order the county clerk to confiscate private property or to order the commissioners to institute a confiscatory suit and the order made by the federal court is not susceptible of a construction that would give it that effect. The Arkansas court in the present case had the right and it was its duty to pass on the validity of the claim brought against Johnson by the commissioners in a mistaken interpretation of the order of the federal court. When the state court determined as it did here that there were no benefits on the Johnson land against which a tax could be legally extended it did not determine any matter which had been adjudicated by the district court nor refuse to give full effect to its judgment.

State of Arkansas v. *St. Louis-San Francisco Ry. Co.* 269 U. S. 172; 46 Sup. Ct. 67.

State v. *St. Louis-San Francisco Ry. Co.* 162 Ark. 443, 454.

The authorities relied on by petitioner in support of its argument that the decision of the Arkansas court prevents the enforcement of its judgment by the federal district court are not in point and have no application. *Supervisors* v. *Durant*, 96 (9 Wall) U. S. 415; *Mayor* v. *Lord*, 96 (9 Wall) U. S. 409; *Hawley* v. *Fairbanks*, 108 U. S. 543. This court's decisions in these cases did not turn upon the fact that the mandamus or mandatory injunction compelling the levy of a tax had issued out of a federal court and that the injunction against collecting the tax had issued out of a state court. The question of conflict between the courts, state and federal, was not involved. Rather, as the court pointed out in *Supervisors* v. *Durant*, the principle involved was not that the federal court as such had any paramount jurisdiction of state courts but that the respective courts are independent of each other. In the opinion in this case the court said that the federal district court is as independent of control by a state court as are the district courts of the state from control by each other. It follows necessarily that since the trial courts, state and federal, are independent of each other neither can control the other. Further in each of the cases involved, as the court was careful to point out (*Hawley* v. *Fairbanks*), the right to the computation and assessment as well as the collection of the tax followed as a matter of law from the establishment of the liability of the municipality by the judgment of the federal court in aid of which the mandamus was issued.

All of these cases involved mandamus proceedings in aid of the holders of judgments against towns or counties. The judgments had been obtained against the municipalities on bonds issued by them, payable out of ad valorem taxes

levied upon the property within the town. The orders of mandamus were opposed by the municipality upon the faith of an injunction obtained against the town or county in the state court prohibiting the levy or collection of any tax upon any property on the ground of the invalidity of the bonds. But the federal court by its judgment in favor of the bondholders had determined the legality of the bonds and for that reason the right to the collection of the tax followed as a matter of law on any property in the town or county subject to taxation.

There was no question of the existence of the property nor of its liability to tax if the bonds were valid and their validity was determined by the judgment of the federal court. The objection interposed to the mandamus in these cases was not that the property of an individual taxpayer sought to be taxed did not exist or was not such as could be legally taxed, but that no tax whatever on any property could be levied in response to the mandamus. The objection to the mandamus which this court overruled in these cases was advanced by the municipality itself upon grounds necessarily precluded by the judgment of the federal court in aid of which the mandamus was sought.

The situation is entirely different here. The drainage district is not interposing as a defense to the mandatory injunction of the federal court an injunction of a state court prohibiting the drainage district from levying or collecting any taxes in the district. The drainage district admits the validity of the federal court decree and obeys it. Respondent Johnson in his individual capacity, admitting the right of the federal court to issue a mandatory injunction and the duty of the district to comply with it, defends the

suit brought in obedience to the federal order on the ground, personal to him alone, that there are no benefits existing upon his land and unpaid, against which the mandatory injunction of the federal court may operate. The taxes ordered to be collected by the mandatory injunction in this case are collectible only from the benefit assessed. If there is no benefit in existence upon any particular taxpayers land, if the benefit liability has been discharged in full, there is no property in existence against which the officer obeying the mandatory injunction of the federal court may proceed.

An analogous situation might have arisen had an individual taxpayer of one of the municipalities involved in the cases under discussion defended a suit brought by the town in obedience to mandamus upon the ground that there was no property in existence on which the tax could be levied or upon the ground that the property was a species exempt from the tax or upon the ground that he had paid the tax sued for. Such a defense, personal to the taxpayer is one that he has the right to make at all events against an exaction, illegal for any reason, and the right to make it is not lost by the mere fact that a federal court has ordered a tax levied on and collected from all property lawfully subject to the tax. The defense interposed by the taxpayer is one personal to himself and as pointed out by this court in the decisions next cited, he is not precluded from making it in the circumstances of this case.

Rees v. City of Watertown, 86 U. S. 107.

Chandler, Receiver, v. Peketz, 297 U. S. 609; 56 Sup. Ct. 602, 603 and 604.

State of Arkansas v. St. Louis-San Francisco Ry. Co. 269 U. S. 172; 46 Sup. Ct. 66, 67.

III

The Decision of the Supreme Court of Arkansas Does Not Deny Full Faith and Credit to the Judgment of the Federal Court.

It is true that an improvement district in Arkansas represents its taxpayers generally in litigation between the district and its creditors in all matters pertaining to the rights of the taxpayers as a class.

Howard-Sevier Road Improvement District v. *Hunt*, 166 Ark. 62.

But this is not to say, as petitioner does, that the district does or may represent its taxpayers in their individual capacities, nor an individual taxpayer in regard to rights personal to the taxpayer and adverse to the district, and not involved in the litigation between the district and its creditors.

The judgment of the federal district court in favor of the Bank of Wellston against the district precluded every taxpayer in the district upon the question of the validity and amount of the certificates held by the bank and upon the right of the bank to its judgment. The judgment of the federal court in the suit by the bank for a mandatory injunction bound every taxpayer in the district upon the question of the right of the bank to compel the officers of the district to extend taxes against all benefits unpaid and liable to taxation and to bring suits for the collection of all taxes unpaid and owing to the district. But neither judgment bound any individual taxpayer on the question of whether, in his individual capacity, the taxpayer was in

fact or in law indebted to the district when sued in obedience to the order of the federal court.

The taxpayers, in neither suit in the federal court, had any right to become parties or to be made parties. The suits were against the district and not against the taxpayers.

Rork v. *Smith*, 12 N. W. (Wis.) 408.

In re Assessment for Local Improvement Sewer District No. 1, 147 Pac. (Wash.) 199.

Grand Island & W. N. & R. Co. v. *Baker*, 45 Pac. 494.

City of Auburndale v. *State*, 155 So. (Fla.) 97.

Redwood Highlands Co. v. *Town of Redwood*, 224 Pac. (Cal.) 780.

Northern Pacific Ry. Co. v. *Snohomish County*, 172 Pac. (Wash.) 878.

The individual taxpayer not only had no right to be a party to the litigation between the bank and the district but he could not intervene in the case for the purpose of taking an appeal in the event the district did not.

Normandy Beach Development Company v. *U. S.* 69 Fed. (2d) 105.

Ocean Beach Heights v. *Brown-Crummer Co.*, 302 U. S. 614; 58 Sup. Ct. 385.

The only proper parties to a mandamus, or to a proceeding in equity for a mandatory injunction) are the relators who seek to compel the performance of a duty and those upon whom the duty is imposed by law.

There is no difference between a mandamus and a mandatory injunction in aid of a judgment except that one issues from a court of law and the other from a court of

equity. The judgment in either suit does not, and in the nature of things cannot, run against third persons not parties to the suits upon rights personal to them, for the determination of which according to law, they are entitled to a day in court."

Further, the object of a writ of mandamus or a mandatory injunction is merely to enforce the performance of an existing duty, not to create new rights or new duties.

Ex parte Rowland, 104 U. S. 604, 612.

No court has power either by mandamus or mandatory injunction in aid of its judgment to compel the levy of a tax which is not authorized by law.

U. S. v. County of Macon, 99 U. S. 582, 591.

In the suit for the mandatory injunction the federal court had the right to compel the officers of the district to levy and collect a tax on benefits to the extent that such benefits were subject to taxation. It did not have the power to decide and it did not attempt to decide whether any individual tract of land was subject to taxation under the law. The very purpose of the federal district court's order was to submit to the court having jurisdiction, questions of this character which might arise between the district and the taxpayer. The action of the bank in applying to the federal court for the mandatory injunction, the action of the court in granting the injunction were both in recognition of the necessity for the determination of these questions if any arose and in recognition of the right of the taxpayer to be heard on the question in a court of jurisdiction.

The decision of the Supreme Court of Arkansas, therefore, does not deny full faith and credit to the decree of the federal district court. On the contrary it is made in full recognition of that order, in compliance with it and in an effort to decide the very questions which the federal court, by its order, directed to be submitted to the state court for its decision.

IV

The Question of Collusion in the State Court and of Amount of Benefits Remaining to Pay the Judgment Against Petitioner Are Not Presented in This Case.

There is neither allegation nor proof in this case tending to support petitioner's claim of collusion in the decrees in the state chancery court in 1931 and 1932, or to show that if these decrees are sustained the creditors of the district will be unable to collect their judgments. When respondent interposed the decrees of the Lincoln Chancery Court in defense to this suit the district failed to attack the decrees on the ground of collusion and the creditors, who are represented by the same counsel who represents the district, failed to intervene for that purpose or to bring an independent suit to establish that allegation. No evidence was offered upon the question which was raised for the first time upon appeal.

The basis for the argument is found in the fact that in the second decree it appears from the lands described that some of the commissioners of the district were relieved from the payment of further taxes upon some of their lands. However petitioner seems to concede that there was no collusion in the state court decree in 1931 in which Johnson

was a party. That decree determined the question of law involved and as the record shows, was followed very naturally by a similar suit by other taxpayers who found themselves in the same position as Johnson. It is fairly inferable from the record that in this proceeding the court determined to settle all issues of this character between the district and its taxpayers in one proceeding. An audit of the affairs of the district was made which shows that some of the lands of a number of taxpayers including some of the lands of the commissioners had satisfied in full the benefit assessed against them. The decree, therefore, relieved all of these taxpayers of further payment of taxes. Reference to the list of taxpayers relieved will show among them various insurance companies and individuals not parties to the class suit. The party most frequently mentioned seems to have been the State of Arkansas whose lands are not subject to taxation for improvement districts while the title remains in the state.

The statement of petitioner to the effect that the bank will not be able to collect its judgment if the action of the Arkansas court is sustained is wholly unsupported in the record. The meaning of the Victor Felley exhibit on page 41 of the record is not clear and the purpose of its presence in the record cannot be determined with certainty but it does show as outstanding in the district the following benefits as of September 13, 1935, several years after the entry of the state court decrees:

Delinquent benefits	$39,899.30
Assessed benefits unpaid	52,119.40
Total	$92,018.70

To this sum must be added six per cent interest per annum for more than 20 years or a total of more than 100 per cent of the uncollected benefits. In addition it appears from the decree in the federal district court that the district claimed to own lands subject to sale by it for payment on the judgment. (Rec. 19).

Nor is it important that the decrees of the state court may have been erroneous. They are nevertheless binding until reversed on appeal or set aside in a proper action.

Chicot County Drainage District v. *Baxter State Bank*, decided by this court January 2, 1940.

Jeter v. *Hewitt*, 22 How. 352.

Tri-County Highway Improvement District v. *Vincennes Bridge Company*, 170 Ark. 22.

CONCLUSION

The decrees of the Lincoln Chancery Court of 1931 and 1932 were *res judicata* in this suit against respondent. The decision of the Arkansas Supreme Court was right.

It is respectfully submitted that the writ of certiorari granted in this case should be dismissed and the decision of the Supreme Court of Arkansas affirmed.

CHARLES T. COLEMAN,
WALTER G. RIDDICK,
For Respondent.

Little Rock, Arkansas.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT, ET AL.....*Petitioners*

v. No. 595

A. J. JOHNSON .....*Respondent*

ON CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR REHEARING

GEORGE B. ROSE,
Attorney for Petitioners.

PARAGON PRINTING CO., LITTLE ROCK

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PETITION FOR REHEARING

Petitioners respectfully request that the Court grant them a rehearing in this cause, and assign as the ground therefor the fact that the Court overlooked important considerations in reaching its conclusion that the decree of the United States District Court, ordering assessment and collection of taxes upon each tract of land in the district, was not *res adjudicata* when subsequently pleaded by the petitioners in the foreclosure suit in the Lincoln Chancery Court.

When the creditors of the district brought suit in the federal court for the purpose of obtaining a mandatory injunction to compel the commissioners to levy and collect taxes in order to pay the judgment of said court, the commissioners filed an answer asserting that they had been enjoined by a decree of the Lincoln Chancery Court from collecting any further taxes from the lands of numerous landowners within the district (R. 32). Nevertheless the federal court held that the creditors were entitled to the relief which they sought, and the court ordered that the assessments be levied and collected (R. 22). This Court now holds, however, that this decree of the federal court could not be pleaded as *res adjudicata* in the state court, for the reason that the defense raised by the commissioners in the federal court was personal to each landowner and therefore could not be pleaded for him by the commissioners. We respectfully submit that the undisputed facts contained in the record show conclusively that the defense was not personal to these landowners and was of such a character that the commissioners could and should have pleaded the defense for them.

In the consideration of this question it should be borne in mind that in Arkansas there is no personal liability on the part of the landowner for an improvement district assessment. The creditors must look to the lands alone for payment, and an action to foreclose the unpaid assessments is *in rem*. (*Snetzer* v. *Gregg*, 129 Ark. 542, 547). Hence this defense was certainly not personal to each landowner as an individual, as it ran with the land. It is extremely improbable that the very same persons who owned the lands in 1932, when the state court decree was

entered, still own these lands and benefit by the holding in this case.

Clearly the manner in which this particular defense originally arose had nothing of a personal character. Two of the landowners had filed suit in the Lincoln Chancery Court for the purpose of having the court adjudge that full payment of their assessments, without interest, was a complete satisfaction of the lien against their lands. None of the other one hundred landowners whose lands were released by the final decree appeared in court, nor does the record show that they even had knowledge of the suit. The court on its own motion required an auditor to ascertain on what lands the assessments had been paid in full, and thereupon it entered its decree enjoining the commissioners from collecting further assessments from those lands. (R. 8). It is hard to see how a defense could be less personal in character than one which originated through no action of the person claiming it and involved the assertion on his part of no effort whatever. Inasmuch as the landowners who did not appear must necessarily have been represented either by the two plaintiffs in the Fish case or by the court itself, it is evident that the defense is not so personal that it must be asserted by each landowner individually. It should be remembered that in this case the respondent Johnson alone is representing all the other landowners in pleading this defense. Thus there is no inherent reason why the commissioners are disabled from asserting the defense for the landowners.

If it be conceded that the defense is not personal in the sense that no one except the landowner himself can assert the defense, the remaining question to be determined is whether the commissioners of the district were proper

parties to plead the defense for the landowners. If their reasons for pleading the defense were equally as strong as those of the individual landowners, and if there was no conflict of interest which would prevent the commissioners from energetically seeking to establish the defense for the landowners, no reason can be seen why the commissioners should not undertake to represent the land owners.

It has been held by the Supreme Court of Arkansas that the district represents its taxpayers and should plead for them any defense which they may have. (See pages 20 and 25 of our original brief.) In the federal court the creditors of the district were parties plaintiff; so unless the defendant district and its commissioners were representing the landowners, there was no one for them to be representing. The situation is similar to that of an executor or administrator, who is held to represent the heirs in a contest with the creditors and to represent the creditors in a contest with the heirs.

In their official capacity, the commissioners certainly had reason vigorously to assert the fact that they had been enjoined by action of the Lincoln Chancery Court. Not to have urged this defense might have placed them in the position of being in contempt of the court which had enjoined them from proceeding further against the lands discharged by the state court decree. Apart from their official capacity, the commissioners as individuals had been relieved of taxes amounting to approximately $29,000 by the state court decree (our brief, p. 9); so their personal interest coincided exactly with their position as commissioners of the district.

Finally, if the commissioners had been successful in the federal court in their plea of the state court injunction, it is clear that the individual landowners would have been entitled to the protection afforded them by this successful defense, as the federal court would not then have ordered the collection of assessments from the lands released by the Fish decree. A similar situation existed in the state court in 1932, as the landowners now seek to take advantage of a decree which was entered without notice to them, but which was in their favor. Since the landowners would undoubtedly have benefited by a favorable holding in the federal court, the equitable principle embodied in the rule of mutuality of estoppel requires that they be bound by an adverse decision.

For the reasons set forth we earnestly urge that the defense of these landowners had not the personal character which would have prevented the commissioners from raising the defense for them. This being true, in view of the fact that the commissioners unsuccessfully asserted the defense in the federal court, we submit that the landowners should be foreclosed from again asserting the same defense in the state court.

Petitioners respectfully request that they be granted a rehearing and that upon such rehearing the decision of the Supreme Court of Arkansas be reversed.

Respectfully submitted,

GEORGE B. ROSE,

Attorney for Petitioners

CERTIFICATE

I, George B. Rose, counsel for petitioners, certify that the foregoing petition for rehearing is presented in good faith and not for delay.

GEORGE B. ROSE.

SUPREME COURT OF THE UNITED STATES.

No. 595.—October Term, 1939.

Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties, Arkansas, et al., Petitioners,
vs.
A. J. Johnson.

On Writ of Certiorari to the Supreme Court of the State of Arkansas.

[March 25, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Kersh Lake Drainage District was organized, in 1912, under the general drainage law of Arkansas.[1] An assessment of the value of benefits to accrue to each of the tracts of land embraced in the District was duly made, upon the basis of which annual levies were extended against each tract. And the District issued interest bearing certificates of indebtedness in payment of construction work done for it by contract.

Respondent Johnson, a landowner in the District, brought suit against the District and its Commissioners in the Lincoln Chancery Court of the State of Arkansas in order to establish that he had fully paid the share of benefit taxes apportioned to his land and was therefore entitled under Arkansas law to have his land declared free from any further drainage tax liability. In 1931, that State court rendered its final decree to the effect that the lien of the District for such taxes had already been "fully satisfied and released", and enjoined further extension of drainage taxes against his lands. In 1932, the same State court rendered a like decree in favor of W. A. Fish and other named landowners of the District.

November 1, 1935, a judgment against the District was obtained by certificate holders in the Federal court for the Eastern District of Arkansas. The Circuit Court of Appeals affirmed.[2] To enforce their judgment, these creditors then instituted proceedings in the

[1] Acts of Ark. 1909, p. 829.
[2] 85 F. (2d) 643.

same Federal District Court, for mandatory injunction to require the appropriate County clerks to extend drainage benefit taxes for the District upon their tax books; to require County officials to collect these taxes; and to provide that "if any property owners fail to pay their drainage tax the defendant, Kersh Lake Drainage District and its Commissioners be required to institute suit for the collection of the delinquent taxes, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, ..." Answering, the District set up among other defenses that "a large number of tracts of land in the District have fully paid the entire value of assessed benefits against said lands and that said property owners obtained a decree in the Lincoln Chancery Court in the case of W. A. Fish, et al. v. Kersh Lake Drainage District on June 15, 1932, enjoining and restraining the Commissioners of the defendant District from levying or extending any tax against these lands, the assessed benefits of which have been fully paid."

The District Court decreed that a mandatory injunction issue compelling the "County clerks and County collectors to perform their duties in the collection of the drainage taxes upon the lands in suit"; that there be extended taxes "of six and one-half per cent of the benefits assessed against each tract of land . . . until the whole of the decree has been satisfied"; that the "Commissioners . . . be required to institute suits for the collection of all delinquent taxes of said District, and to prosecute the same forthwith to a conclusion, . . ."; and that "the said Commissioners are deemed receivers of this court . . . ." And the Circuit Court of Appeals affirmed.[3]

Pursuant to this mandatory injunction, the drainage taxes were extended on the tax books but respondent Johnson and other landowners in whose favor the decrees of the Lincoln Chancery Court had been rendered, refused to pay. Suit for collection was filed against their lands in the Lincoln Chancery Court by the Commissioners. In reliance upon the 1931 and 1932 State Chancery Court decrees as final determinations that the assessments apportioned to their respective tracts of lands had been discharged, pleas of *res judicata* were interposed by the landowners. Referring to this answer of the landowners, the Commissioners amended their com-

[3] 92 F. (2d) 783.

plaint and alleged (1) that the State court decrees of 1931 and 1932 were void because certificate holders had not been made parties, and (2) that the certificate holders' judgment against the District and the mandatory injunction decree of the Federal Court were "*res judicata* of all the questions . . . . raised by the" landowners. The trial court decided against the landowners, but the Supreme Court of Arkansas reversed and held that the unappealed Chancery Court decrees in 1931 and 1932 amounted to conclusive adjudications that the particular lands here involved were responsible for no further benefit taxes, thus sustaining the landowners' pleas of *res judicata*.[4]

First. The unappealed 1931 and 1932 Decrees of the Lincoln Chancery Court of the State of Arkansas.

As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the State law, to render the 1931 and 1932 decrees is "acknowledged",[5] and this determination by the State's highest court is binding upon us. However, petitioners' argument is that these decrees were void because certificate holders were not made parties in and had no notice of the Chancery proceedings. Therefore, they contend that in giving effect to the State court decrees and treating them as *res judicata* in the present proceeding the court below deprived certificate holders of their property without due process of law in violation of the Fourteenth Amendment.[6] Petitioners also add the contention that the 1932 State court decree was "collusive as a matter of law."

Although the Drainage District was not in terms legislatively declared to be a corporation, its powers and limitations were similar to those of corporations and its Commissioners were comparable to corporate directors.[7] Among the duties of the Commissioners—as provided by the very statute upon which the certificates involved here rest—were those of protecting and enforcing creditors' rights on obligations issued by the District.[8] And the Commissioners in

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4.— Ark. —.

5 Cf. Protho v. Williams, 147 Ark. 535, 547.

6 Because of this and the further contention that the Supreme Court of Arkansas had denied full faith and credit to the judgments of the Federal District Court, certiorari was granted. — U. S. —.

7 See, e. g., reference to "the board of directors", Acts of Ark. 1909, p. 849.

8 The Act of 1909 set up detailed standards for creation and control of the District; provided for management of District affairs by a Board of Commissioners under outlined supervision by Arkansas Courts; and intrusted the Commissioners with the conduct and control of litigation for the collection and en-

1931 and 1932 litigated with the landowners the disputed question of proportionate amounts of taxes due the District by virtue of drainage benefits received by the particular tracts here in question.

When these certificates were issued, purchasers were charged with notice of and bound by Arkansas statutes in existence when, and pursuant to which, the debt was contracted and which provided for determination of the proportionate liabilities of lands in the District by Chancery proceedings between the Commissioners and landowners with no requirement of notice to creditors of the District.[9] Thus, the very statutory plan from which the certificate obligations sprang contemplated that the Commissioners should represent the collective and corporate interests of the District, in litigation between the District and a landowner involving matters personal to the landowner.

These certificate holders were not entitled to be made parties in the Lincoln Chancery proceedings just as in practice creditors of a corporation are not, unless otherwise provided by statute, made parties in a suit between a stockholder and the corporation to determine liability on a stock subscription, between the corporation and a third person to recover corporate assets, or in a suit brought against the corporation by creditors, stockholders or officers. It has been held that bondholders are not necessary parties to and are bound by the decree—even if adverse to their interests—in litigation wherein an indenture trustee under a bond issue is a party and exercises in good faith and without neglect his contractual authority to represent and assert the lien securing the issue.[10] And so are these petitioners bound by the decrees in the Chancery suit in which the Commissioners as parties appropriately asserted the lien for benefit of certificate holders—unless there was fraud or collusion.

It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide. And the Supreme Court of Arkansas points out that under controlling Arkansas law

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forcement of unpaid benefits against lands in the District. Such litigation was required to be conducted in the State Chancery Court having jurisdiction in the County where the particular lands were located; and the lands covered by the 1931-1932 Lincoln Chancery Court decrees were located in Lincoln County. Arkansas Acts 1909, p. 829.

[9] Rees v. City of Watertown, 19 Wall. 107, 120; United States v. County of Macon, 99 U. S. 582, 590.

[10] Elwell v. Fosdick, 134 U. S. 500, 512, 513; Richter v. Jerome, 123 U. S. 233, 246-7.

the Chancery decrees "could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record."[11]

But petitioners nevertheless insist that the State court's chancery decrees cannot avail the landowners because of the subsequent judgments of the Federal District Court.

Second. The Judgments of the Federal District Court.

Petitioners pleaded the final judgments of the Federal District Court as conclusive adjudications of the issues raised by the landowners' defense based upon the Chancery decrees. The refusal of the court below to accept the District Court's judgments as determinative of the individual landowners' liabilities constituted, petitioners claim, a denial of full faith and credit to those Federal judgments. With this contention we do not agree.

In order that the District might be afforded a basis for suits in the State courts to recover taxes with which to pay the judgment against it, the District Court ordered a mandatory injunction requiring County officials to extend on their books drainage taxes against all the lands in the District as a whole, including those here involved. This preliminary to State court suits in which the actual respective liabilities of the individual landowners could be determined was performed, and thereby this provision of the injunction was carried out. The Commissioners were also enjoined to file and prosecute suits in the State courts to collect all such taxes that were delinquent. This was done. Irrespective of whether the District was empowered to represent the landowners when the extension of taxes as a whole was ordered, by its mandatory injunction the District Court did not attempt to foreclose the State court from hearing all matters of personal defense which individual landowners might plead in the suits for collection. Instead, the District Court appropriately left for the State court's determination any such personal defenses available under Arkansas law.[12] And here the Supreme Court of Arkansas has sustained as personal defenses the decrees of payment and discharge obtained by individual landowners in Arkansas Courts of competent jurisdiction. Accordingly, petitioners misconstrue entirely the decree of the District Court in arguing that

[11] — Ark. —, —.

[12] Cf. Arkansas v. St. Louis-San Fran. Ry. Co., 269 U. S. 172, 176; Chandler v. Peketz, 297 U. S. 609, 611.

unless its injunction is carried out without any reference to the prior State court decrees, injunctions by a State court will be permitted to obstruct the execution of a Federal court's judgment.[13] In view of our construction of the mandatory injunction and the fact that its mandates have been fully carried out, it is unnecessary for us to consider the existence or present vitality of the doctrine said to be established by the cases relied upon by petitioners.[14]

The subsantial effect of the District Court's judgments was no more than a determination that a total balance was still due the complaining certificate holders by the District; that drainage taxes sufficient to discharge this balance should be extended on the proper County tax books in accordance with Arkansas law; and that suits against individual landowners be filed for judicial ascertainment of their proportionate shares of the total. Neither the adjudication of the total liability nor the order for extension of drainage taxes on the local tax books was an adjudication of the varying proportionate liabilities of the respective landowners. Determination of these liabilities was properly left for the State court. A decreed total liability for the District was still consistent with the principle that "when the proportion [taxable against a particular tract] is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources."[15]

These landowners were neither served with process nor heard in either the certificate holders' suit against the District or the mandatory injunction proceeding. No relief against them as individuals was either sought or adjudged. The Commissioners did represent all landowners in unsuccessfully defending the certificate holders' suit for an adjudication of the total collective corporate obligation of the District as an entity. In the present suit the landowners have not asserted, and the Supreme Court of Arkansas has not upheld, any attack upon that judgment, which might be valid although uncollectible against the District or any individual landowners.[16] The

[13] Petitioners rely upon Riggs *v.* Johnson County, 6 Wall. 166; United States *v.* Council of Keokuk; *Id.*, 514; The Mayor *v.* Lord, 9 Wall. 409; The Supervisors *v.* Durant, *Id.*, 415; Hawley *v.* Fairbanks, 108 U. S. 543.

[14] But see Erie R. Co. *v.* Tompkins, 304 U. S. 64, 78 and Ruhlin *v.* N. Y. Life Ins. Co., *Id.*, 202, 205.

[15] Rees *v.* City of Watertown, *supra*, 119-20.

[16] Barkley *v.* Levee Comm., 93 U. S. 258, 265-6.

fact that the Commissioners, in the injunction proceedings against the District unsuccessfully attempted to interpose defenses peculiar and personal to the individual landowners cannot foreclose the individual landowners, who were not present, from thereafter pleading a defense otherwise valid. Certainly, the decree in the injunction suit in the Federal court would not prevent an individual property owner from subsequently interposing the defense that his property was not in fact included within the Drainage District.[17] Cognate personal defenses, such as the one that a landowner's proportionate drainage tax liability has been declared by the judgment of a competent tribunal to have been "ascertained and paid", were not foreclosed by the Federal District Court's judgments.

The judgments of the Federal court were not denied full faith and credit by the Supreme Court of Arkansas.

Affirmed.

Mr. Justice McREYNOLDS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[17] Ocean Beach Heights *v.* Invest. Co., 302 U. S. 614. Cf. Normandy Beach Dev. Co. *v.* United States, 69 F. (2d) 105.